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AZ CORP COMMISSION
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Our File Number: 38889-00012

December 2, 2005

**Hand Delivered**

Arizona Corporation Commission
Docket Control – Utilities Division
1200 W. Washington Street
Phoenix, Arizona 85007

Re: In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms and Conditions or Interconnection with Qwest Corporation
Docket No: T-01051B-05-0350 and T-03654A-05-0350

Attached is Level 3 Communications, LLC's Reply Brief in the above-referenced matter.

Very truly yours,

Matt Hall

Michael T. Hallam

MTH/jw
Attachments

cc: Christopher Kempley (w/attach.)
Maureen Scott (w/attach.)
Ernest Johnson (w/attach.)
All Parties of Record (w/attach.)

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**BEFORE THE STATE OF ARIZONA**
**ARIZONA CORPORATION COMMISSION**

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| In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State laws for Rates, Terms, and Conditions of Interconnection with Qwest Corporation | : : : : : : : : | Docket No. T-01051B-05-0350<br>T-03654A-05-0350<br><br>**LEVEL 3'S POST-HEARING BRIEF** |

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Dated: December 2, 2005

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**BEFORE THE STATE OF ARIZONA**
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## Preliminary Statement

The differences between Qwest's and Level 3's positions are so stark that it is well to recall the legal framework that governs this proceeding. Keeping that framework in mind highlights those differences, and shows why Level 3 is correct and Qwest is not.

This is an arbitration under Section 252 of the federal Communications Act of 1934, as amended (the "Act"). Under that statute, the open issues between the parties are to be viewed through a single lens: what does the law require? In other words, what result is required by Sections 251 and 252 of the Act, and applicable FCC rules and regulations? *See* 47 U.S.C. § 252(c)(1) (state commission must resolve open issues by imposing terms that implement the requirements of Sections 251 and 252 and FCC regulations). Simply following what the law and regulations actually say will resolve many of the parties' disputes, and in Level 3's favor.

To the extent that the issues in this case are not clearly controlled by applicable law – and Level 3 submits that they are – the overarching policies of the Act (as amended by the Telecommunications Act of 1996) give the Commission further grounds to rule in Level 3's favor. The Act is designed to encourage the growth of competition in all telecommunications markets and to promote the deployment of advanced services throughout the country. So, if there are issues where the Act and the FCC's rules are not completely clear, those policies provide the touchstone in deciding how to rule. Indeed, while Section 251(d)(3) of the Act preserves state authority to implement these policies in state-specific ways, that section makes clear that any exercise of state authority must "not substantially prevent implementation of ... the purposes of this part," *i.e.,* it must promote, rather than interfere with, the development of competition and the promotion of advanced services.

Of course, there is no conflict between federal policy and Arizona policy on this point. This Commission recognizes that, in the Telecommunications Act of 1996, "Congress established a new regulatory scheme to foster local exchange competition among telecommunications carriers."[1] Moreover, this Commission has repeatedly made reference to Arizona's policy of encouraging competition in telecommunications markets. In one case, for example, the Commission commented that arrangements that negatively affect "the ability of telecommunications providers to fairly compete, [and] customers' ability to have a choice of providers and services" are "antithetical to the purpose of the federal Telecommunications Act, as well as our stated policies and rules encouraging competition and choice in the telecommunications industry."[2] The Commission has also noted that "hinder[ing] customer

[1] In the matter of the Investigation into Qwest Corporation's Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts, Docket No. T-00000A-00-0194, Decision No. 64922, 2002 Ariz. PUC LEXIS 11 (June 12, 2002) at [*166].

[2] Application of Accipter Communications, Inc. to Extend its Certificate of Convenience and Necessity in Maricopa County, Docket No. T-02847A-02-0641, Decision No. 67574 (Feb. 15, 2005) at ¶ 30.

choice and competition ... is inconsistent with our rules and stated policy encouraging competition in the telecommunications industry."[3]

Promoting competition in Arizona has not always been easy, however. For example, as of the year 2000, this Commission was able to state unequivocally that "there is no effective competition in the [Qwest] service area in Arizona."[4] Of course, the year 2000 was probably the high water market of the competitive telecommunications boom; as Level 3 observed in its opening brief, since that time the industry has been littered with dozens upon dozens of competitive carrier bankruptcies. *See* Level 3 Brief at 1-2 & n.1. If that were not enough, a few years later, this Commission discovered that Qwest had been actively and improperly suppressing what competition had managed to survive: over an extended period of time Qwest failed to provide CLECs with the same favorable interconnection terms and conditions it had provided to a few select CLECs. The Commission accepted a settlement of that case "in order to rectify the harm to competition in this state that resulted from Qwest's conduct."[5]

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3 *See, e.g.,* In the matter of the Application of Bullseye Telecom, Inc. for a Certificate of Convenience and Necessity to Provide Resold Long Distance and Facilities-Based Local Exchange Services in the State of Arizona, and Petition for Competitive Classification of Proposed Services, Docket No. T-04276A-04-0667; ) Decision No. 67751, 2005 Ariz. PUC LEXIS 89 (April 11, 2005) at ¶ 21.

4 In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI, International Telecom Corp., USLD Communications, Inc. Phoenix Network, Inc. and U S West Communications, Inc., Docket No. T-01051B-99-0497, Decision No. 62672, 2000 Ariz. PUC LEXIS (June 30, 2000) at [*44]. *See also id.* at Finding of Fact ¶ 26 ("Arizona consumers of basic phone serviced have no effective competition for their business").

5 In the matter of U S West Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996; In the matter of Qwest Corporations' compliance with Section 252(e) of the Telecommunications Act of 1996; Arizona Corporation Commission v. Qwest Corporation, Docket No. T-00000A-97-0238; Docket No. RT-00000F-02-0271; Docket No. T-01051B-02-0871, Decision No. 66949, 2004 Ariz. PUC LEXIS 12 (April 30, 2004) at [*94]. *See also id.* at Findings of Fact, ¶ 39 ("By providing discounts and escalation procedures to Eschelon and McLeod, Qwest impermissibly discriminated against other CLECs and harmed competition in Arizona").

This arbitration presents an opportunity for the Commission to allow competition in Arizona to recover and grow. Indeed, the whole point of Sections 251 and 252 of the Act is to create a statutory framework within which innovative companies like Level 3 can make inroads into what was once the protected monopoly enclave of the ILECs. Moreover, the focus of the Act is to encourage ***facilities-based*** competitors, such as Level 3, rather than entities that simply resell all or part of the incumbent's network.[6] Facilities-based competitors deploy different networks and different technologies than the incumbent, and must therefore operate in ways that the incumbent will view as disruptive and inconsistent with "the rules" as the incumbent sees them. Only by operating in this way will Level 3, and the competition that Level 3 enables, create competitive pressure sufficient to change how the incumbents behave in the market.

Nothing in the Act prevents the ILECs from remaining prosperous in the face of such competition, but to do so they must change and adapt – not simply build higher and higher walls around the old ways of doing things. A company whose profits and technology have evolved around a single-purpose network – a circuit-switched telephone network connecting voice subscribers to each other – will naturally feel that change must be resisted. And Qwest has indeed resisted Level 3's reasonable, real-world tested, fair and equitable contract offers –

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6 This focus is evident in the so-called "Triennial Review Order" and "Triennial Review Remand Order." *See* In the matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capabilities, CC Docket Nos. 01-338 *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking,* FCC 03-36 (rel. August 21, 2003) at ¶70 ("We reaffirm the conclusion in the UNE Remand Order that facilities-based competition serves the Act's overall goals"); In the matter of Unbundled Access to Network Elements (WC Docket No. 04-313); Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338), *Order on Remand,* FCC 04-290 (rel. Feb. 4, 2005) at ¶ 3 ("By adopting this approach, we spread the benefits of facilities-based competition"); *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004), (the purpose of the Act "is to stimulate competition – preferably genuine, facilities-based competition."), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

provisions that in one form or another govern Level 3's interconnection with the nation's three largest incumbents, in 36 states. There can be no justification other than simple backward-looking protectionism to impose Qwest's convoluted, internally inconsistent and patently discriminatory interconnection, network architecture and compensation requirements upon Level 3. In economic terms, if not literally, Qwest's proposals are designed to, and do, reverse every legitimate competitive advantage Level 3 could hope to offer, for no reason other than that Level 3 does things differently from the way Qwest has always done them.[7]

As described in our opening brief, there are two key issues that separate the parties: interconnection architecture and cost responsibility related thereto; and intercarrier compensation for ISP-bound and VoIP traffic, including VNXX traffic. In each case, Level 3 asks this Commission to approve contract terms that are directly consistent with – indeed, in some cases compelled by – the governing statutory and regulatory provisions, as well as common sense and industry practice. And on those few nuances or details where the law and regulations might not be directly controlling, Level 3's proposals are plainly designed to encourage competition and

[7] When the shoe is on the other foot, Qwest understands this. For example, in May 2004, Qwest sought authority in Colorado to expand its Denver Metro Exchange into the territory of a small ILEC, the Eastern Slope Rural Telephone Association, Inc. ("Eastern Slope"), because an Eastern Slope customer, the Front Range Airport Authority, was expanding and wished to obtain services from Qwest. Qwest argued that taking Eastern Slope's business was "a foreseeable and natural consequence of the introduction of competition in the local service market." And, when Eastern Slope complained that competition from Qwest would cause it to lose business customers and suffer a decrease in future revenues, Qwest replied that "in this era of telecommunications competition, there is no principle of law or public policy which guarantees any carrier, rural or otherwise, the receipt of future revenues from future customers." *See* In The Matter Of The Application Of Qwest Corporation For Approval Of Its Revised Exchange Area Map For The Denver Metro Exchange Area Aurora Zone And The Declaration Of Qwest Corporation Of Its Intent To Serve Within The Territory Of Eastern Slope Rural Telephone Association, Inc., A Rural Telecommunications Provider, *Recommended Decision Of Administrative Law Judge Mana L. Jennings-Fader Granting Amended Application, In Part And Subject To Conditions; Ordering Declaration Of Intent To Serve To Become Effective In Part And Subject To Conditions; Granting Motion; Denying Motion; And Extending Time For Commission Decision* Decision No. R05-0215, ¶ 60 (CO PUC, February 17, 2005) ("*Eastern Slope Recommended Decision*").

innovation in Arizona telecommunications markets on terms that are reasonable and fair to both Parties.

This proceeding presents the Commission with an opportunity to set the course for competition within Arizona for years to come. This is the first time that the benefits of IP-enabled voice services have matured to the point that Level 3's IP network is and can be – if this Commission will allow it – the vanguard of a form of facilities-based competition that does not rely upon resale or leasing piece-parts of ILEC networks. Level 3 is not a traditional LEC and has never claimed to be one. Yet over and again, Qwest wants to force Level 3 to play by rules that only make sense for traditional LECs. This is opposite of what the law requires. It is also the opposite of good public policy. Good public policy will encourage competition and the deployment of innovative services in Arizona. Accomplishing those goals, in this case, means that the Commission should approve Level 3's proposed contract terms.

## **Summary**

Level 3 Communications, LLC ("Level 3") respectfully submits this post-hearing reply brief in connection with Level 3's arbitration under Sections 251 and 252 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 251-52, against Qwest Corporation ("Qwest"), to establish a new interconnection agreement between Qwest and Level 3. Level 3's arguments are summarized below.

*VNXX-Routed Traffic.* Level 3 addresses VNXX traffic in Section I.A of this brief. In our opening brief we addressed network interconnection, VNXX arrangements, and intercarrier compensation, in that order. Qwest devotes much of its brief to VNXX-related issues (*see* Qwest Brief at 3-33, 44-49), so Level 3 will deal with that issue first. Where we have dealt with one or more Qwest arguments in our opening brief, we will refer to our earlier arguments but not fully restate them.

Level 3 seeks to use VNXX arrangements for the origination and termination of two species of traffic – ISP-bound traffic, and VoIP traffic – over which the FCC has exercised substantial if not total jurisdiction.[8] For these types of traffic, as a practical matter, the location of the calling and called parties is unknown, unknowable, or simply indeterminate. Because this traffic is inseparably interstate and because the FCC has exercised exclusive jurisdiction over it, the Commission must apply federal statutory and regulatory provisions to determine whether VNXX arrangements should be permitted and what intercarrier compensation arrangements should apply. And, in light of the overarching pro-competitive goals of federal (and Arizona) law, the Commission should carefully consider the practical implications of the parties' proposals to ensure that the law is applied in a manner that promotes competition within Arizona.

Qwest claims that Level 3's VNXX arrangements are inconsistent with federal numbering guidelines. In fact, however, it is Qwest's position that flies in the face of numbering requirements. Federal regulations require numbers to be made available in a manner that accomplishes three purposes: (a) facilitating entry into the market; (b) not unduly favoring any particular group of consumers or providers; and (c) not unduly favoring any particular technology. 47 C.F.R. § 52.9(a). Yet Qwest wants this Commission to degrade, if not destroy, Level 3's ***ability to enter the market*** by denying Level 3 the right to use numbering resources for

8 *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic, *Order on Remand and Report and Order,* 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*") at ¶¶ 52-65 (ISP-bound traffic jurisdictionally interstate and subject to FCC regulatory authority); Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, *Memorandum Opinion and Order,* WC Dkt. No. 03-211 (rel. Nov. 12, 2004) ("*Vonage Ruling*") at ¶¶ 1, 12, 14, 20-41 (VoIP traffic jurisdictionally interstate and subject to FCC regulatory authority).

its IP-based services; it wants this Commission to ***unduly favor Qwest*** by protecting Qwest from competition; and it wants this Commission to ***unduly favor circuit-switched over IP-based technology*** by eliminating the advantages of IP-enabled calling. It is simply impossible to square what Qwest is asking this Commission to do – interfere with Level 3's ability to offer its services, by denying it access to numbers – with the plain requirements of federal numbering regulations.[9]

With respect to ISP-bound VNXX-routed traffic in particular, as Level 3 anticipated, Qwest argues that somehow when the FCC issued the *ISP Remand Order* to address the problem of regulatory arbitrage, the FCC silently and by implication chose to ignore the "routine" practice of CLECs using VNXX arrangements to serve ISPs. *See* Qwest Brief at 9-16; Level 3 Brief at 50-72 (anticipating Qwest argument). Nothing in Qwest's brief detracts from Level 3's explanation of why Qwest's position is untenable. In fact, in the face of continuing demand for access to the Internet and the services that Internet access can provide, Qwest is trying to use legacy regulation to take its pound of flesh from firms like Level 3, that facilitate such access.[10]

Qwest also gamely tries to preserve the notion that telephone numbers somehow inherently and necessarily relate to particular geographic regions. *See* Qwest Brief at 23-24. As Level 3 has already explained, however, even if that was partially true in the 1950s when the Bell System introduced area codes and NXXs, it has been eroding since the 1980s.[11] Not only is

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9 *See also* 47 U.S.C. § 253(a) (banning state actions that foreclose the provision of any interstate or intrastate telecommunications service).

10 Level 3 is one of the three largest Tier 1 Internet backbone providers in the United States and enables a vast number of carriers and non-carrier enhanced service providers, including the largest incumbent telecommunications carriers in the country, to provide ISP-dialup and Voice over Internet services, among other things. *See* Ducloo Direct at 9-15.

11 Even when they were first introduced, the assignment of area codes – the first three digits in an NPA-NXX-XXX code – were not used as a marker of a customer's specific, physical location; rather they

there is no reason to try to preserve it now,[12] such an effort would be impossible.[13] Qwest's persistence on this issue is all the more surprising, given that Qwest witness Brotherson admitted that there were numerous exceptions and conceded that the policy behind geographically-linked numbers is suspect. *See* Iowa Tr. 729-762; *see also* Tr. 855 (Brotherson admitting that OneFlex permits creation of "virtual communities of interest").[14] Moreover, Qwest should not be heard to argue that NXXs must be limited to a specific geography when its corporate sibling is selling its OneFlex product with up to five "Virtual Numbers" – even where that sibling pays tribute to its corporate brothers by "purchasing" "PRIs" in every local calling area. More broadly, if landline

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were assigned for technical reasons: "In order to facilitate direct dialing calls, the NANP was created and instituted by AT&T, then the U.S. telephone monopoly, in 1947. However, the first customer-dialed calls using area codes did not occur until late 1951. Originally there were 86 codes, with the biggest population areas getting the numbers that took the shortest time to dial on rotary phones. That is why New York City was given 212, Los Angeles given 213, and Chicago 312, while Vermont received 802 (a total of 20 clicks, 8+10+2). Four areas received the then-maximum number of 21 clicks: South Dakota (605), North Carolina (704), South Carolina (803), and Nova Scotia/Prince Edward Island in the Canadian Maritimes (902). Additionally, in the original plan a middle digit of zero generally indicated the number was for an entire state or province, while a middle digit of one indicated that it was for a smaller region." North American Numbering Plan, from Wikipedia, the free encyclopedia. *available at* http://en.wikipedia.org/wiki/North_American_Numbering_Plan.

12 In fact, in a generic proceeding regarding Virtual NXX codes, Pennsylvania regulators concluded, after comprehensive consideration of comments from numerous ILECs and CLECs, that there was no basis for confidence that the traffic originating in an ILEC's local calling area was, in fact, "local." "We acknowledge that the current methods of identifying and rating all telephone calls, including telephone calls facilitated by VNXX arrangements, do not readily ascertain whether the traffic that originates at a local exchange calling area of an ILEC can be properly classified as anything other than local traffic." Generic Investigation Regarding Virtual NXX Codes, Pennsylvania Public Utility Commission, Docket No . I-00020093 (Sept. 9, 2005) at 10.

13 Other major incumbent carriers agree. SBC, for example, in comments submitted to the FCC observed that "it would be nonsensical, as well as impractical and cumbersome, to develop regulations for IP platform services that hinge on the physical location of the sender or recipient of those services." *See Petition of SBC Communications Inc. for a Declaratory Ruling*, WC Docket No. 04-29, at 39 n.76 (filed Feb. 5, 2004).

14 Qwest made a point of including materials from the Qwest-Level 3 Iowa arbitration in this case. *See* Qwest Brief at 5 n.3. Attached as Attachment #1 hereto are certain excerpts from testimony in Iowa indicating his awareness of the non-geographic nature of VoIP and virtual number services, including those offered by Qwest.

services are to continue to compete against wireless services – which are completely untethered from geographic limitations – then landline services must be untethered as well.

*Intercarrier Compensation.* Level 3 addresses intercarrier compensation in Section I.B of this Brief. On this topic, Qwest raises two main arguments. First, Qwest claims that the FCC's regime for compensating ISP-bound calls does not apply to VNXX-routed calls, noted above. Second, Qwest claims that Level 3 is trying to exempt VoIP traffic from normal intercarrier compensation rules. As discussed above, there is no reason to view VNXX-routed ISP-bound calls as outside the purview of the FCC's compensation regime – which does not permit discriminatory treatment of ISP-bound calls. And, as explained in Level 3's opening brief (at pages 50-54), it makes sense to apply that same regime to VoIP traffic as well.

*Interconnection Architecture and Costs.* Level 3 addresses interconnection architecture and costs in Section II of this Brief. Federal law entitles Level 3 to a single point of interconnection (per LATA) with Qwest, and forbids Qwest from charging Level 3 for traffic Qwest originates. Qwest says that the issue isn't the number of physical points of interconnection, but, rather, whether Level 3 has to pay for Qwest-originated traffic. *See* Qwest Brief at 51-54. Level 3 agrees that the issues are related: one way that Qwest can inappropriately force Level 3 to pay too much money for interconnection is to make Level 3 establish multiple POIs; another is to simply charge Level 3 for Qwest-originated traffic. But on the merits, Qwest is wrong on both counts. As Level 3 anticipated in its opening brief, Qwest simply misreads the governing FCC rule (47 C.F.R. § 51.709(b)) to allow it to charge Level 3 for facilities used to connect their networks, and then calculate a discount based on Qwest-originated traffic. *See* Level 3 Brief at 26-33. In fact, as Level 3 explained, Qwest-originated traffic is irrelevant:

Qwest can only charge Level 3 for the share of internetwork capacity that is used for Level-3-originated traffic.

*Miscellaneous Issues.* Qwest addresses certain miscellaneous issues, which we discuss in Section III of this Brief.

# I. THE COMMISSION SHOULD PERMIT VIRTUAL NXX ARRANGEMENTS FOR LEVEL 3'S VOIP AND ISP-BOUND SERVICES, AND SHOULD APPLY UNIFORM AND NONDISCRIMINATORY INTERCARRIER COMPENSATION TO SUCH SERVICES.

In this section of this Reply Brief, Level 3 addresses both the basic question of authorizing the use of VNXX arrangements for ISP-bound and VoIP traffic, and the question of what intercarrier compensation arrangements should apply to such traffic. These issues are embodied in disputed contract language laid out in the Joint Arizona Matrix ("Matrix") Issue Nos. 3 and 4. For the reasons described below and in Level 3's opening brief, the Commission should approve Level 3's contract language on these issues, and reject Qwest's.

## A. Law, Policy and Technology All Support Permitting The Use of VNXX Arrangements for ISP-Bound and VoIP Traffic.

Qwest argues that this Commission should ban the use of VNXX arrangements. *See* Qwest Brief at 18-23. In today's telecommunications market, however, there is real demand for virtual number-based services. Qwest is responding to this demand with its OneFlex service; it would be seriously discriminatory to forbid carriers like Level 3 from offering their own virtual number services. Not only would this be bad policy for consumers, it would also be unlawful under both state and federal law. [15]

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15 In arguing against VNXX service, Qwest relies heavily on its claim that in "real" FX service, the customer bears the cost of transporting the call from the switch housing the FX number to the customer's (by definition) distant premises. *See* Qwest Brief at 27-28, 30. Qwest, however, completely ignores the uncontroverted evidence that Qwest's transport costs associated with VNXX traffic are, in fact, *de*

### 1. Federal Law Provides The Rule of Decision On This Issue.

Initially, as an overall matter, in establishing the terms of an interconnection agreement the Commission must apply the directives contained within the federal Communications Act – specifically, Sections 251 and 252 – and related FCC rules and rulings. *See* 47 U.S.C. § 252(c)(1). In this regard, it is important to note that the two applications for which Level 3 seeks to use VNXX arrangements are jurisdictionally interstate. Specifically, Level 3 wants to use VNXX routing with respect to (a) inbound traffic to ISPs and (b) inbound traffic to VoIP platforms.[16] The FCC has consistently and repeatedly ruled that calls to ISPs are within federal jurisdiction. *See ISP Remand Order, supra* at ¶¶ 52-65. Similarly, the FCC has declared that VoIP services are inseparably interstate, and has, therefore, ruled that states may not interfere with their operation and growth. *See Vonage Ruling, supra* at ¶¶ 1, 12, 14, 20-41.

The fact that these are interstate services matters, because it means that the Commission's state-level authority does not directly reach either ISP-bound calling or VoIP. This is not to say that the Commission lacks authority to rule on these issues in this proceeding. It has such authority, but it derives not from state law but from the delegation of federal law contained in Section 252 of the Act.[17] Indeed, on this point, Level 3 agrees with Qwest: "state commissions,

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*minimis. See* Level 3 Brief at 19, *citing* Exhibit RRD-22; Tr. 26-27. If Qwest's rates for "real" FX service are needed to cover Qwest's costs, that only proves that its "real" FX service is grossly inefficient as compared to VNXX service – which is hardly a reason to suppress VNXX.

[16] VoIP entities receiving service from Level 3 will also generate outbound traffic, but that raises different issues. *See infra.*

[17] In fact, in 47 U.S.C. § 251(e), Congress has federalized the entire topic of number administration. This federalization of numbering issues does not restrict the Commission's power with respect to what jurisdictionally intrastate services carriers under its authority may offer. It does confirm, however, that when the services at issue are jurisdictionally interstate, as they are here, federal law controls from beginning to end. As a result, it should not be "striking" that Level 3 focuses on federal, not state law, regarding ISP-bound calling and VoIP traffic. *See* Qwest Brief at 18. When evaluating the use of VNXX arrangements for these categories of traffic, the relevant "choice of law" is federal, not state law.

under authority delegated by the Act, must follow decisions of federal courts interpreting the Act and interpreting FCC decisions that implement the Act." Qwest Brief at 15 & n.21. For this reason, Qwest's reliance on Arizona rules and statutes – and even its own self-serving tariffs (which are not binding on this arbitration in any event) – to try to suppress Level 3's VNXX-based services, is simply beside the point. *See* Qwest Brief at 18-22.[18]

As noted at the outset of this reply brief, Arizona law recognizes and supports the policy embodied in the Telecommunications Act of 1996 to promote competition.[19] That said, certain aspects of Arizona law – and, certainly, Arizona law that pre-dates the Telecommunications Act of 1996 – have viewed telephone service as being confined to specific geographic areas.[20] Even so, Arizona rules are not implacably inconsistent with Level 3's position. For example, the definition of "toll service" in the Commission's rules actually tracks the federal definition, characterizing it as service "between stations in different exchange areas ***for which a long distance charge is applicable.***" *See* Ariz. Admin. Code., Title 14, Chapter 2, Article 5, Section R14-2-501(23) (emphasis added).[21] Similarly, the Commission's definition of "Extended Area Service" equates "local" service with service for which there is no toll charge. *See* Ariz. Admin. Code, Title 14, Chapter 2, Article 13, Section R14-2-1302(9). This, too, is consistent with the federal definition of "telephone toll service" upon which Level 3 relies. Given these provisions,

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[18] Level 3 certainly does not contest that Qwest's tariffs reflect Qwest's preference for such geographically restricted services. It is well-established, however, that a carrier may not make an end-run around the process of negotiating and arbitrating an interconnection agreement under Sections 251-252 of the Act by filing a tariff that purports to constrain the results of that process. *See Global NAPs, Inc. v. FCC,* 247 F.3d 252 (D.C. Cir. 2001); *Verizon North v. Strand*, 309 F.3d 135 (6th Cir. 2002); *Wisconsin Bell v. Bie*, 340 F.3d 441 (7th Cir. 2003).

[19] *See supra,* text at nn. 1-5.

[20] For example, Qwest itself notes that the primary Arizona statute on which it relies "long predated the 1996 Act." Qwest Brief at 18.

[21] *Compare* 47 U.S.C. § 153(48).

it would certainly not offend Arizona law to adopt Level 3's substantive positions regarding the use of VNXX arrangements and the treatment of VNXX traffic as subject to reciprocal compensation, rather than access charges.

The fact remains, however, that because ISP-bound and VoIP traffic are jurisdictionally interstate, federal law, not state law, must be the touchstone of resolving these issues. This is all the more clear in light of the fact that the Arizona rules on which Qwest relies were all promulgated in 1996 or earlier.[22] The key FCC ruling affecting these issues, however, is the *ISP Remand Order,* which was decided in 2001, along with relevant court rulings interpreting it – mainly *WorldCom v. FCC*[23] and *Pacific Bell v. Pac-West Telecomm,*[24] decided in 2002 and 2003, respectively. Even if it were appropriate in the abstract to rely on state level authority to resolve these federal level matters, controlling federal-level legal developments have superseded any relevance of the state-level authority on which Qwest relies.[25]

At bottom, however, Level 3 is not seeking to use its numbering resources in the context of traditional, jurisdictionally intrastate geographically restricted services. It is seeking to use its numbering resources to offer jurisdictionally interstate, geographically untethered services. Any restrictions on its right and ability to do so must derive from federal law – and no such restrictions exist.[26]

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22 *See* "Historical Notes" to Ariz. Admin. Code, Title 14, Chapter 2, Sections 5, 9, and 14.

23 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003).

24 325 F.3d 1114 ($9^{th}$ Cir. 2003).

25 Qwest notes (at page 30, note 33) that certain Iowa cases had previously held that the Iowa Board did not favor VNXX arrangements. In fact, the Iowa Board, Level 3 and other parties have reached a settlement of the litigation arising from those rulings, which indicates that VNXX arrangements are acceptable. *See* Attachment #2 to this Reply Brief.

26 Again, Level 3 emphasizes that it is not seeking to challenge or denigrate this Commission's authority in any way, either in this specific proceeding or in general. Rather, as the Supreme Court has

### 2. VNXX Arrangements Are Entirely Consistent With Federal Numbering Policies And Guidelines.

From one perspective, the use of VNXX arrangements for ISP-bound and VoIP traffic is simply a numbering issue. VNXX arrangements assign numbers to customers in a manner to which Qwest objects. *See* Qwest Brief at 31-32. In fact, however, numbering policies fully support the use of numbers for VNXX services.

The basic federal rule governing the assignment of telephone numbers is 47 C.F.R. § 52.9(a). That rule states that decisions about numbering "***shall***" do the following three things (emphasis added):

> (1) ***Facilitate entry into the telecommunications marketplace*** by making telecommunications numbering resources available on an efficient, timely basis to ***telecommunications carriers***;
>
> (2) Not unduly favor or disfavor any particular ***telecommunications industry segment*** or group of telecommunications consumers; and
>
> (3) Not unduly favor one ***telecommunications technology*** over another.

This provision applies fully both to federal numbering authorities and to states operating under delegated authority with respect to numbering matters and contains several points relevant to the dispute between Qwest and Level 3. *See* 47 C.F.R. § 52.9(b).

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observed, the Telecommunications Act of 1996 has the effect of (to some degree) conflating the traditional separation of regulatory authority over both interstate and intrastate matters. *See Iowa Utilities Board v. AT&T,* 525 U.S. 366 378-79 & n.6 (1999). Sections 251 and 252 of the federal Act (among others), generally administered by the FCC, apply equally to services that are jurisdictionally interstate and those that are jurisdictionally intrastate. Consequently, when a state regulator such as this Commission is establishing interconnection terms and conditions (under federal law), those decisions will affect both interstate and intrastate services. As a result, when determining any particular disputed issue, one of the Commission's tasks is to ensure that the legal and regulatory authorities relied upon are those appropriate to the issue at hand. Level 3's point here is simply that the issue of the assignment of numbering resources for use with jurisdictionally interstate ISP-bound and VoIP VNXX services is a matter of federal and not state law, so that this Commission must make its decision on the basis of federal, not state, legal and regulatory authorities.

First, numbering resources are to be made available to "telecommunications carriers." Under federal law, a "telecommunications carrier" is any entity that offers any form of "telecommunications" for a fee. *See* 47 U.S.C. § 153(44). Level 3 is plainly a "telecommunications carrier" when it provides PSTN connectivity to ISPs and VoIP providers, so this rule applies to Level 3 here.[27] By commanding that numbering resources are to be available to "telecommunications carriers" in general, as opposed to any specific type of carrier, this rule simply eviscerates Qwest's basic claim that only entities offering traditional local exchange service are entitled to numbers.

Second, the ***purpose*** of making numbers available is to "facilitate entry into the telecommunications marketplace." This short phrase contains two distinct elements. Plainly, numbering resources should never be withheld to keep someone ***out of*** the market. That, however, is exactly what Qwest is asking the Commission to do by seeking a ban on VNXX for VoIP and ISP-bound calling. *See* Qwest Brief at 22-23. But it also bears emphasis that numbering resources are supposed to be made available to facilitate entry into the "telecommunications" market. Again, the governing federal rule does not offer numbers only to those providing traditional, geographically tethered local service. To the contrary: the rule

[27] Level 3 is certificated in Arizona, and it offers tariffed DID / DOD services – in competition with Qwest. DID is the same, functionally, as the PRIs Qwest sells. Tr. at 95-97. As to the services provided to ISPs, the FCC's *ISP Remand Order* holds that ISP-bound calling would literally be a form of "telecommunications" that would be subject to reciprocal compensation under Section 251(b)(5), but for the FCC's understanding that Section 251(g) "carves out" so-called "information access" traffic. *See ISP Remand Order* at ¶¶ 30-31 (noting that Section 251(b)(5) applies to all telecommunications and would apply to ISP-bound calls unless carved out by Section 251(g)). As to the services provided to VoIP entities, the *Vonage Ruling* clearly states (at ¶ 8) that when these entities obtain connectivity to the PSTN from a CLEC, that is a form of "telecommunications service."

describes both the entities to receive numbers, and the markets into which those entities will enter, in the broadest possible terms.[28]

Third, numbering resources must be assigned in a manner that does not discriminate among different types of carriers ("telecommunications industry segments"). On the one hand, for example, this means that wireless carriers are entitled to numbers even though their users are not geographically tethered at all. On that other, it means that traditional LECs like Qwest have no special, privileged claim to numbering resources for their geographically limited services. Entities like Level 3, which provide telecommunications services to ISPs and VoIP providers, are just as entitled to numbers for their services as anyone else.

Fourth, the FCC fully understood that telecommunications technology was changing and that it would make no sense to give providers using traditional technology any sort of numbering advantage. So, the rule restricts giving any particular telecommunications ***technology*** – such as Qwest's circuit-switched technology – a special right or preference to numbers that is not shared by IP-based carriers such as Level 3. The result of doing otherwise would be to hobble those companies that offer IP-based services and know how to best utilize them. And again, the fact that Qwest's particular ***technology*** was at one time the only technology is no justification for restricting Level 3's ability to offer competitive services on a wider geographic basis.

Qwest's arguments and proposed contract language regarding VNXX arrangements (*see, e.g.,* Matrix, Issue Nos. 1G, 1H, 3, 3B, 4) completely ignores these plain, overarching federal

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28 The Commission has recognized the prominence of competitive considerations in dealing with numbering issues, noting that one of the key goals of numbering administration is to ensure "that all carriers have the numbering resources they need to compete in the rapidly growing market place." *See* In the matter of the Generic Investigation into Number Resource Optimization and Implementation of Number Pooling in Arizona, Docket No. T-00000A-01-0076, Decision No. 63,982, 2001 Ariz. PUC LEXIS 5 (August 30, 2001) at ¶ 9 (*citing* FCC rulings to that effect).

policies governing numbers. It cannot be that Qwest was unaware of these policies, however, since Qwest hangs its regulatory hat on a regulator provision just a few pages away in the *Code of Federal Regulations* from the provision discussed above. Specifically, Qwest argues that VNXX is an "improper" use of numbering resources under certain industry guidelines to which the FCC refers in 47 C.F.R. § 52.13. *See* Qwest Brief at 31-2.[29] Qwest's argument is misleading at best.

First, Qwest is incredibly selective in its quotation from and interpretation of Rule 52.13. Qwest argues that the rule notes, and indicates conformity with, some industry guidelines that Qwest says have the effect of banning VNXX arrangements. *See* Qwest Brief at 31-32 But this argument focuses on the small veins on a leaf on a single tree, ignoring the forest in which it sits. So, for example, Rule 52.13 states that the North American Numbering Plan Administrator "shall assign and administer [numbering] resources in an efficient, effective, ***fair, unbiased, and nondiscriminatory*** manner consistent with industry-developed guidelines ***and Commission regulations.***" 47 C.F.R. § 52.13(b) (emphasis added). *See also* 47 C.F.R. § 52.13(d) (to the same effect). So the very rule on which Qwest relies requires that numbering authorities be non-discriminatory, in a manner "consistent with ... [FCC] regulations." But Rule 52.9(b), quoted above, gives specific content to what it means to be "fair" and "nondiscriminatory" in the

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29 In light of these requirements of the federal numbering rules, there is simply no basis for Qwest's claim (Qwest Brief at 1) that Level 3 is trying to "game" the North American Numbering Plan. Contrast, for example, Qwest's claims that Level 3's use of VNXX codes violates code assignment guidelines with the guidelines themselves:

> It is assumed from a wireline perspective that CO codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer's premise physically located in the same rate center that the CO codes/blocks are assigned. *Exceptions exist, for example tariffed services such as foreign exchange service.*

*See* Central Office Code (NXX) Assignment Guidelines; Industry Numbering Committee 95-0407-008; § 2.14 (May 28, 2004) (emphasis added). Level 3's use of telephone numbers is consistent with these guidelines, and industry practice, in all respects. *See* Gates Direct at p. 43-46.

assignment of numbers: namely, facilitating market entry; not favoring any existing industry segment (like traditional LECs over CLECs); and not favoring any particular technology (like circuit-switching over packet switching).

Moreover, Rule 52.13 does not, as Qwest suggests, weld numbering resources to traditional uses. To the contrary, that rule expressly recognizes that nontraditional uses of numbering resources will arise. The Rule does not say to ban them or to prevent carriers from offering services using them. To the contrary, it says that numbering authorities should explore how to make the resources available – including, specifically, central office codes (NXXs).[30]

In this regard, the FCC has expressly recognized that CLECs "are able to serve larger geographic areas because they can deploy higher capacity switches and use dedicated transport in combination with those switches to serve customers throughout a wider geographic area,

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[30] Rule 52.13(b), subsections (11)-(13), state that the numbering administrator's tasks include: "(11) Reviewing requests for all numbering resources to implement new applications and services and making assignments in accordance with industry-developed resource planning and assignment guidelines; (12) Referring requests for particular numbering resources to the appropriate industry body where guidelines do not exist for those resources; [and] (13) Participating in industry activities to determine whether, when new telecommunications services requiring numbers are proposed, NANP numbers are appropriate and what level of resource is required (*e.g.,* line numbers, central office codes, NPA codes)." In this regard, as noted in Level 3's opening brief, the NXX code is a "central office" code. *See* Numbering Resource Optimization, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Telephone Number Portability; CC Docket Nos. 99-200, 96-98, & 95-116, *Fourth Report and Order in CC Docket No. 99-200 and CC Docket No. 95-116, and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 99-200* (released June 18, 2003) at ¶ 1 n.1 ("The NANP was established over 50 years ago by AT&T to facilitate the expansion of long distance calling. It is the basic numbering scheme for the United States, Canada, and most Caribbean countries. The NANP is based on a 10-digit dialing pattern in the format NXX-NXX-XXXX where "N" represents any digit 2-9 and "X" represents any digit 0-9. ... The second three digits represent the ***central office code***, or NXX, commonly referred to as an exchange.") In other words, NXXs designate central offices (basically, switches) within the PSTN. Yet the FCC has recognized from the beginning that CLECs will not deploy networks that duplicate the ILEC's network; instead, CLECs will often deploy a few centrally-located switches that serve a wide area. *See* In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order,* 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") at ¶ 1090 From the beginning, therefore, there has been no *necessary* connection between a particular NXX code and any particular end user's location.

beyond the particular wire center where the switch is located." As a result, CLECs "can and do serve such areas using switches located in other areas."[31] Indeed, the FCC specifically found that "[c]ompetitive LECs can rely on newer, more efficient technology than incumbent LECs (whose networks have been deployed over decades), such as packet switches."[32] If the CLEC switch serving a particular wire center is located outside of that wire center, the CLEC's numbers associated with that wire center will necessarily "reside" in the distant switch, not in the wire center itself. This is the inevitable result of deploying a more efficient network, and is not in any way an effort to "game" or distort numbering rules. In this regard, FCC Rule 52.15(g)(4) clearly permits states to authorize the use of numbering resources that depart from their traditional uses. While Level 3 believes that it meets all relevant criteria, this rule empowers the Commission to authorize VNXX arrangements in any event.

Furthermore, any Qwest suggestion that there is anything inappropriate or unreasonable about services that use VNXX and similar non-geographic numbering arrangements is completely unwarranted in light of what the FCC has said – and not said – about such services. First, consider VNXX arrangements used for ISP-bound calling. Level 3 showed in its opening brief that the FCC was fully aware that CLECs were using VNXX arrangements to serve ISPs in the proceedings leading up to the *ISP Remand Order* – in part because Qwest itself made a point of telling the FCC about them. *See* Level 3 Brief at 59-63. *See also id.* at 60 (in *ISP Remand Order,* at ¶ 92, the FCC cited to Qwest's complaint that ISPs were not physically located in

[31] *Order on Remand,* Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 20 FCC Rcd 2533 (2005) *petitions for review pending, Covad Communications Corp., et al. v. FCC, et al.,* Nos. 05- 1095 et al. (D.C. Cir.). at ¶ 207 (footnotes omitted).

[32] *Id.* (footnote omitted).

every local calling area when it decided that "the proximity of the ISP or other end-user to the delivering carrier's switch, however, is irrelevant to reciprocal compensation rates").

Put aside the question whether, as Level 3 contends in its opening brief, this awareness on the part of the FCC shows that the *ISP Remand Order's* intercarrier compensation scheme extends to VNXX-routed traffic. Whether it does or not, the fact that the FCC was plainly advised of the existence of VNXX arrangements in this context, before April of 2001, puts the lie to any claim that the FCC thinks such arrangements violate numbering assignment requirements. It would have been a simple matter for the FCC to indicate its disapproval of these arrangements. But it did not do so.

Any doubt about the FCC's acceptance of non-geographic use of NXX codes is, of course, obliterated by the agency's acceptance of – indeed, encouragement of – the deployment of IP-enabled services. The FCC has repeatedly found that a beneficial feature of such services is the ability of consumer to be "nomadic," *i.e.,* to move an IP phone with a particular number assigned to it from place to place with no change in the number.[33] Indeed, if the FCC had wanted to indicate its disapproval of this type of use of numbering resources, it had a perfect opportunity to do so last summer when it was confronted with problems with E911 functionality arising in connection with nomadic VoIP services.[34] The FCC did not find that there was anything inappropriate from a ***numbering*** perspective about these services; it merely expressed

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[33] *See, e.g., Vonage Ruling, supra,* at ¶ *5* ("In marked contrast to traditional circuit-switched telephony, however, it is not relevant where that broadband connection is located or even whether it is the same broadband connection every time the subscriber accesses the service. Rather, Vonage's service is fully portable; customers may use the service anywhere in the world where they can find a broadband connection to the Internet").

[34] In the matter of IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers, 20 FCC Rcd 10245 (June 3, 2005) ("*VoIP E911 Ruling*").

its displeasure with the then-existing E911-related limitations on such services.[35] In the context of consumers suffering severe injuries or death, if the FCC even remotely believed that it was wrong to assign NXX codes to IP voice devices that do not physically "reside" in the area associated with an NXX code, it surely would have said something. But the FCC said no such thing. It simply required the VoIP industry to make changes necessary to ensure that consumers are informed of the E911 limitations of their services (if any) and – most notably here – directed VoIP providers to find a way ***to update 911 authorities of a VoIP customer's actual location.***[36]

In this regard, the FCC's most recent statement regarding the role of IP-enabled services, such as those offered by Level 3 and its customers, is telling. In September 2005 the FCC released its order indicating that interconnected VoIP services are subject to the Communications Assistance for Law Enforcement Act ("CALEA"), requiring network operators to have systems in place that ease the burdens of law enforcement in conducting lawful surveillance.[37] In explaining why it was extending CALEA to IP-enabled services, the FCC noted that "[in] today's technological environment, ... IP-based broadband networks are ***rapidly replacing the legacy narrowband circuit-switched network.***"[38] Both the *VoIP E911 Order* and the *VoIP CALEA Order* show that the FCC understands the new reality in the industry – innovative, IP-

35 *See* 47 C.F.R. §9.1 *et seq.* (new E911 rules for VoIP providers). In this regard, Level 3 is an industry leader in providing E911 connectivity, including accurately updated location information, for VoIP providers. *See* "Level 3 Announces Level(3) E-911 DirectSM Service" (Sept. 19, 2005), available at: http://www.level3.com/press/6395.html; "Vonage® Selects Level 3 To Expand 911 Capabilities" (Sept. 19, 2005), available at: http://www.level3.com/press/6396.html; "TCS And Level 3 Execute Agreement For VoIP E9-1-1" (Sept. 19, 2005), available at: http://www.level3.com/press/6397.html.

36 *See* 47 C.F.R. § 9.5(d) (rule requiring easy way for consumers to update their location information).

37 In the matter of Communications Assistance for Law Enforcement Act, and Broadband Access and Services, *First Report and Order and Further Notice of Proposed Rulemaking,* 20 FCC Rcd 1489 (September 23, 3005) ("*VoIP CALEA Order*").

38 *VoIP CALEA Order* at ¶ 11 (emphasis added).

enabled technologies are "rapidly replacing the legacy narrowband circuit-switched network." The FCC accepts this reality and is taking appropriate steps, as it unfolds, to preserve the public interest. Qwest, however – whose core business involves ***operating*** "the legacy narrowband circuit-switched network" that is being "replaced" by the likes of Level 3, is (perhaps understandably) in deep denial, and is seeking to recruit this Commission as an ally in stemming the tide of new services and innovative offerings – including Level 3's VNXX-routed ISP-bound and VoIP services.

### 3. Level 3's Analysis Of Why VNXX Is Necessary And Appropriate Is Completely Different From That Presented By AT&T.

In an earlier case, AT&T sought a general declaration that "exchange service" should be defined as any service where the call originated and terminated in the same local calling area, but restricted the means to resolve that purely geographic question to looking at the originating and terminating NXX codes.[39] AT&T's proposal, therefore, simultaneously sought to retain the concept of a purely geographical definition of "local" calling, but then employ a means of determining location that on its face would not serve that purpose. The Commission rejected that artificial construct.

Here, Qwest tries to tar Level 3 with the brush of the Commission's rejection of AT&T's contradictory approach. *See, e.g.,* Qwest Brief at 20-21. Qwest goes so far as to say that "AT&T, like Level 3 in this case," proposed to define "EAS/Local Traffic" in reference to calling and called party NPA/NXXs. *Id.* But this is simply not true. Level 3 is not trying to somehow sneak a non-geographic use of NXX codes "under the radar" by misdefining what

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[39] *See* Re AT&T Communications of the Mountain States, Inc., Docket No. T-02428A-03-0553; Docket No. T-01051B-03-0553; Decision No. 66888 2004 WL 1493948 (Ariz. C. C. April 6, 2004) at *9.

constitutes a geographically "local" call. To the contrary, as shown in the final Matrix (and, indeed, by Level 3's entire discussion of the *ISP Remand Order*), Level 3 recognizes – as has the 9th Circuit, in the *Pacific Bell* case, *infra* – that the relevant FCC rules no longer even worry about whether traffic is geographically "local." Moreover, consistent with the governing federal statute, Level 3 proposes to define "telephone exchange service" exactly as that term is defined in the Communications Act. *See* Matrix, Issue No. 14 (Definitions); *see discussion, infra.*

It is certainly true that the effect of following the FCC's rules (and the definitions in the Communications Act) is that traffic that is not geographically "local" will be subject to reciprocal compensation rather than access charges. *See* Level 3 Brief at 50-73. To ensure that this legally correct result is embodied in the parties' contract, Level 3 has proposed language to make clear that reciprocal compensation, not access charges, should apply to VNXX traffic. But as described in Level 3's opening brief and in the immediately following section of this brief, Level 3 takes that position plainly and directly. Level 3 does so because it makes policy sense (if no toll charges are collected with respect to a call, there is no reason for access charges to apply) and because it comports with the governing provisions of federal law (the FCC's definition of "telecommunications" subject to reciprocal compensation in Rule 51.701(b) and the statutory definitions of "exchange access" and "telephone toll service").

In sum, neither Level 3's proposal to rely on the Communications Act's definition of "telephone exchange service," nor Level 3's policy and legal rationales in support of the use of VNXX arrangements, were presented in the AT&T case on which Qwest relies. To the contrary, the Commission's ruling in that case gives no indication of ever having considered Level 3's arguments, in that or any other previous case. As a result, the fact that the Commission rejected

AT&T's earlier arguments does not suggest that the Commission should reject Qwest's very different arguments here.

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For all these reasons, the Commission should reject Qwest's invitation to live in the past. Geographically indeterminate services have become the rule, not the exception.[40] FCC numbering rules require that "telecommunications carriers" be assigned numbering resources in order to "facilitate entry" and without discrimination against any type of technology. The purpose of the 1996 Act (and, indeed, Arizona law) is similarly to encourage market entry and new technology. The services for which Level 3 seeks to use VNXX routing – ISP-bound calling and VoIP arrangements – are jurisdictionally interstate, so the Commission here must base its ruling on this issue on considerations of federal law. Level 3 submits that in these circumstances the only reasonable result is that the Commission should expressly authorize the use of VNXX routing for these services.

40 Level 3 explained in its opening brief that mobile wireless services are inherently geographically indeterminate, since wireless customers can and do move, and since the major wireless carriers all have roaming plans in effect that allow a wireless customer with an "Arizona" phone number to make and receive calls anywhere in the country. *See* Level 3 Brief at 48, 51. The most recent FCC figures show that as of today, there are ***more*** wireless lines in service than there are fixed landline lines. According to the most recently available *Statistics of Common Carriers,* as of year-end 2004, there were approximately 142 million landline ILEC lines in service, while as of that same time there were more than 181 million wireless lines in service. FCC Wireline Competition Bureau, Industry Analysis Division, 2004/2005 Statistics of Common Carriers (November 2005) at Table 2.3 (ILEC landline lines) and Table 5.6 (wireless lines) (ILEC landline lines) and Table 5.6 (wireless lines). Add to this the millions of numbers assigned by LECs to VoIP services, and the numerical advantage of geographically indeterminate services over geographically fixed services gets even larger.

### B. Intercarrier Compensation For VNXX-Routed ISP-Bound and VoIP Services.

#### 1. VNXX-Routed ISP-Bound Traffic.

As Level 3 anticipated, Qwest rehashes its crabbed reading of the *ISP Remand Order* to try to show that when the FCC referred to "ISP-bound traffic," it really meant to say ISP-bound traffic "where the ISP is physically located in the same [local calling area] as the customer placing the call," Qwest Brief at 9-10. *See also id.* at 9-17. Qwest is wrong. Level 3 respectfully refers the Commission to its opening brief on this issue. Level 3 Brief at 54-73.

Very briefly, as Level 3 explained there, the FCC's original, 1996-era reciprocal compensation rule limited compensation to "local" traffic, which in that context meant traffic that begins and ends in the same local calling area. Controversy arose about whether calls to ISPs were really "local" – despite the ISP being in the same calling area – as a result of the peculiar characteristics of connecting end users to the Internet. In resolving this issue in the *ISP Remand Order,* the FCC recognized that its original focus on whether ***any*** traffic – ISP-bound or not – was "local" was a "mistake," which had created "ambiguities." The agency undertook to "correct" that "mistake" in the *ISP Remand Order.*[41]

So – precisely to correct the "mistake" of classifying traffic as "local" or not – the FCC's new reciprocal compensation rules don't say anything about "local" traffic at all. That concept has simply dropped out of the analysis.[42] Despite the FCC's plain and unequivocal

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[41] *See ISP Remand Order* at ¶ 45 ("mistake" to rely on notion of "local" traffic); ¶ 46 (term "local" creates "ambiguity" because it is not grounded in the statute); *id.* (*ISP Remand Order* "corrects" the earlier "mistake").

[42] *Compare* current text of FCC Rule 51.701(b) (which makes no reference to "local" traffic) *with* original text of rule, contained in Appendix B of the *Local Competition Order* (which expressly states that reciprocal compensation only applies to geographically-defined "local" traffic). See Exh. L-14; Tr. 301-02 (Brotherson admitting that FCC struck the word "local" every time it appeared in the rule.)

repudiation of the concept of "local" traffic, Qwest complains that Level 3 would require intercarrier compensation "for termination of both local and non-local" traffic. Qwest Brief at 2. Qwest blinks reality, seemingly unable to grasp that the entire notion of "local" traffic has vanished from the governing FCC rules. Indeed, the federal appeals court for the 9th Circuit, in which Arizona lies, has expressly recognized that, in the *ISP Remand Order,* the FCC "abandon[ed] the local versus interstate distinction." *Pacific Bell v. Pac-West Telecomm Inc.,* 325 F.3d 1114, 1122 (9th Cir. 2003). Yet nowhere in its entire brief does Qwest ever acknowledge the existence of this binding 9th Circuit precedent, much less try to harmonize this ruling with its own insistence on the primal importance of whether traffic is "local" or not. Qwest is simply inviting this Commission to ignore not only what the FCC itself did in the *ISP Remand Order,* but also to ignore the fact that the 9th Circuit – unlike Qwest – has recognized what the FCC did.[43]

At the same time that the FCC was eliminating the notion of "local" traffic, it also concluded that all "information access" traffic, including ISP-bound traffic, was carved out from the reach of Section 251(b)(5)'s reciprocal compensation requirement, due to the terms of Section 251(g). This legal conclusion was overruled by the courts in *WorldCom v. FCC,* but the courts let stand the FCC's new intercarrier compensation regime applicable to ***all*** "ISP-bound"

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43 For this reason, Qwest's invocation of the need to read the *ISP Remand Order* in "context," *see* Qwest Brief at 10, is not the reasonable request it might seem. What Qwest is actually asking the Commission to do is to ignore the plain words of the actual rules that the FCC adopted. This is not legally permissible – like statutes, rules that are plain on their face – and the absence of the notion of "local" is utterly plain from the text of the FCC's reciprocal compensation rules – may not be altered by consulting "regulatory history." *See infra* note 54. In any event, however, the FCC's order itself is inconsistent with Qwest's continued focus with the geographical notion of "local" calls.

traffic.[44] That new regime is not limited to ISP-bound traffic that would have met the old definition of "local" traffic.[45]

Although Qwest relies on Oregon precedent, Qwest ignores the *Wantel* case noted in Level 3's opening brief (at 33 n.44). In *Wantel,*[46] the Oregon PUC modified its analysis of this issue based in part on the 9th Circuit's decision in *Pacific Bell, supra.* In that case, as discussed above, the 9th Circuit found that the D.C. Circuit's ruling in *WorldCom v. FCC* undid the FCC's attempt to exclude "information access" from the scope of reciprocal compensation – which undermines Qwest's position here.[47]

In sum, Qwest's entire discussion of VNXX-routed ISP-bound traffic has already been rebutted by the discussion in Level 3's opening brief, and, again, we respectfully refer the Commission to that brief. The FCC's compensation regime for ISP-bound calling applies fully

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44 *WorldCom v. FCC,* 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003).

45 Having just re-written its basic reciprocal compensation rule to ***reject*** reliance on the "ambiguous," "non-statutory," "mistaken" term "local," it would have been nonsensical for the FCC to have created a special regime for ISP-bound traffic that incorporates that same "ambiguous," "non-statutory," "mistaken" concept. Again, Level 3 respectfully refers the Commission to the cogent analysis of the Connecticut federal district court in *Southern New England Telephone Company v. MCI WorldCom Communications, Inc.*, 359 F. Supp. 2d 229 (2005). In this regard, Qwest's invocation of the Hobbs Act (*see* Qwest Brief at 10, 15) is totally inapposite. Level 3 is not trying to collaterally attack the validity of any FCC ruling, which is what the Hobbs Act forbids. Level 3 is seeking to have this Commission ***apply*** the *ISP Remand Order* in accordance with the actual reasoning and holding of that order. As noted above, binding 9th Circuit precedent that Qwest ignores – the *Pacific Bell* case cited in the text above – has already held that the FCC rejected the notion of "local" traffic as relevant, and, of course, the *ISP Remand Order* itself makes this clear by characterizing its prior reliance on the concept of "local" as being a "mistake" and by purging the term "local" from the agency's reciprocal compensation rules.

46 Wantel Communications d/b/a ComspanUSA v. Qwest Corp.; Pac-West Telecomm Inc. v. Qwest Corp., *Order,* OPUC Order No. 05-874, IC 8 & 9 (Ore. P.U.C. July 26, 2005) at 25, 30-32.

47 The federal district court decision in *Qwest Corp. v. Universal Telecom, Inc.* 2004 WL 2958421 (D. Ore. 2004), *see* Qwest Brief at 17-18, does not support Qwest's position here. In that case the federal court was interpreting a preexisting contract from before the effective date of the 2001 *ISP Remand Order* that specified that reciprocal compensation was only due for "local" traffic, and that defined "local" traffic in geographic terms, *i.e.,* as beginning and ending within a Qwest-defined local calling area. While one could quibble with the district court's reasoning, the fact that in the face of such language it found that VNXX-routed traffic was not compensable, under that specific contract, says nothing about the intercarrier compensation terms that should be established on a going forward basis in this proceeding.

and completely to ***all*** ISP-bound traffic exchanged between Qwest and Level 3. There is no carve-out for VNXX-routed traffic. As the FCC found, ***all*** ISP-bound traffic is interstate and subject to that body's authority under Section 201 of the Act, and the FCC specifically relied on its plenary authority over ***all*** interstate traffic to establish the new compensation regime for it. Level 3 requests that the Commission so rule, and specifically require that VNXX-routed ISP-bound traffic be subject to the same compensation as "local" ISP-bound traffic.[48]

**2. VoIP Traffic.**

Qwest correctly notes that there are two types of IP-enabled traffic where the parties have a disagreement – TDM-to-IP traffic (which is traffic that originates with Qwest but which is sent to a VoIP provider receiving service from Level 3) – and IP-to-TDM traffic (which is traffic that originates with a subscriber to a VoIP provider receiving service from Level 3 but which is sent to Qwest for termination). *See* Qwest Brief at 40-41. The real issue in dispute here, however, is whether this traffic should be subject to access charges or reciprocal compensation. Level 3 submits that neither of these types of traffic should be subject to access charges.[49]

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48 For the reasons discussed above, Qwest's analysis – focused on the FCC's traditional "ESP Exemption," *see* Qwest Brief at 47-49 – is misplaced. That exemption continues to exist, and continues to entitle information service providers to buy connections to the PSTN at "local" rates. But the extensive FCC regulatory activity on the specific topic of intercarrier compensation, discussed above (and *infra*) requires that those rulings, and not an exegesis of the ESP Exemption, control this case. This is not to say that the ESP Exemption is in any way inconsistent with the analysis Level 3 is propounding – it is not. The basic point of the ESP Exemption is that information service providers are not to be treated like toll carriers subject to access charges. The point is ***not*** that information service providers are to be treated exactly and for all purposes just like end users. If that had been the law, then the FCC would never had held that calls between end users and geographically "local" ISPs were not covered by the old "local" reciprocal compensation rule. Qwest, therefore, pushes the ESP Exemption too far in its attempt to make the location of the VoIP gateway (or ISP gear) the determining factor for purposes of intercarrier compensation.

49 The parties agree that IP-to-IP traffic is irrelevant to the parties' agreement, since that type of traffic will not be exchanged as PSTN traffic between them, so no intercarrier compensation issues will arise with respect to it. The parties also agree that the FCC has ruled that TDM-IP-TDM traffic is subject to whatever intercarrier compensation regime – including access charges on toll calls – would apply to

As noted above, VoIP services are inherently geographically indeterminate.[50] Indeed, regardless of what telephone number is associated with a VoIP device – even if the telephone number came from anywhere within the *entire* North American Numbering Plan[51] – the question of the physical location of the end user is unknowable (and irrelevant to actual exchange of traffic). *See* Tr. at 526-27.

So, with VoIP calls, not only will the user at the VoIP end not necessarily be in the location indicated by the "exchange area" associated with his NPA-NXX code; the VoIP end user will not necessarily be in the same place on two different calls that are identical in terms of their routing within the PSTN. An end user may receive a call from his child's school in the morning on his VoIP phone connected to a broadband connection at his home, and then receive

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such calls even if they were carried as TDM all the way. *See* Qwest Brief at 40-44. Qwest and Level 3 dispute precisely how VoIP traffic should be defined. *See id.* The FCC's consistent application of the end-to-end test for determining the jurisdiction of a particular call (*see, e.g., ISP Remand Order* at ¶¶ 56-58) compels the conclusion that any call as to which there is a net protocol conversion from TDM to IP or back should be treated as a VoIP call, irrespective of whether the conversion takes place at the customer's premises or not. Where there is no net conversion – as in the TDM-IP-TDM traffic just discussed – the traffic is not VoIP. But if there ***is*** a net conversion, then there is no principled basis to exclude it from the scope of VoIP. Level 3 submits that Qwest, by seeking these narrow definitions, is simply trying to limit the impact of the "rapid replacement" of its "legacy narrowband circuit-switched network" by VoIP. *See VoIP CALEA Order* at ¶ 11, *supra.* As a result, Level 3's broader definitions should be adopted for use in the parties' contract.

50 *See, e.g.*, Tr. 502-03 (Qwest witness Linse admitting, in response to various hypothetical call paths between a Vonage customer whose telephone number is (720) 888-1319 connected to Qwest DSL in Phoenix but calling a traditional Qwest landline customer next door (*i.e.* (602) 544-1234), that "as far as the public switch telephone network, the public switch telephone network does not recognize the end users of the Internet."); Tr. at 505-06 (Qwest witness Linse admitting that in several different call flows, neither an internet address nor a telephone number – NPA-NXX-XXX – is tied to the physical location of the end user; they are rather, simply network addresses to which computers on the PSTN and the Internet simply route traffic. "Q. So technically speaking, the NPA/NXX codes are really analogous to a network address, aren't they? A. Yeah, I guess you could characterize it that way").

51 "The North American Numbering Plan (NANP) is an integrated telephone numbering plan serving 19 North American countries that share its resources. These countries include the United States and its territories, Canada, Bermuda, Anguilla, Antigua & Barbuda, the Bahamas, Barbados, the British Virgin Islands, the Cayman Islands, Dominica, the Dominican Republic, Grenada, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Turks & Caicos." a*vailable at* http://www.nanpa.com/about_us/abt_nanp.html.

another call from the same school to the same telephone number that afternoon, with his VoIP phone now connected to a broadband connection at an airport WiFi hotspot in the course of a business trip. It is simply impossible to know. This same problem exists, of course, on calls in the other direction. Just because the VoIP user's telephone number is associated with the same "local exchange" as (say) the customer's home landline telephone, that does not remotely mean that all calls from that phone actually originate in that exchange.

The question is how to handle this inherent lack of knowledge in establishing fair and reasonable intercarrier compensation arrangements. As noted above, in answering this question, the Commission needs to look to federal law and regulations, both because the FCC has declared this type of traffic to be interstate, and because the Commission's task here is to craft an interconnection agreement that complies with federal law.

Qwest – ever wedded to practices in its near-obsolete, and certainly outmoded, "legacy narrowband circuit-switched network" – grasps at the straw of the location of the end user and/or the VoIP gateway as a proxy for the "IP end" of the call. *See* Qwest Brief at 44, 47-49. Level 3 submits that this is administratively unworkable; that it is bad public policy; and that it is inconsistent with the FCC's elimination of the concept of "local" traffic from its reciprocal compensation rules. Instead, the only sensible approach is to subject all VoIP traffic to reciprocal compensation under the same terms as any other Section 251(b)(5) traffic.[52]

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52 Qwest argues that Level 3 has not adequately explained its position that reciprocal compensation, and not access charges, should apply to VoIP traffic. *See* Qwest Brief at 43-44. In fact, Level 3 explained the legal basis for this position in its opening brief, *see* Level 3 Brief at 72-73. We provide further explanation below. In this regard, Qwest claims that there is some inconsistency between Level 3's view that VoIP traffic is not subject to access charges and its view that intercarrier compensation can generally follow a comparison of calling and called NPA-NXXs (which allows VNXX traffic to be properly treated as not subject to access). *See id.* In fact there is no inconsistency. The reason is that when a Qwest customer dials a VoIP subscriber whose number is not "local" to the Qwest customer, that

As discussed above and in Level 3's opening brief, the FCC's original, 1996-era reciprocal compensation rule did, essentially, what Qwest wants to do here: to tie the applicability of reciprocal compensation to the location of the called and calling parties. Specifically, that rule limited "reciprocal compensation" to "local" traffic, with "local" defined in purely geographic terms: whether the call begins and ends in the same state-defined local calling area. In the *ISP Remand Order,* the FCC specifically and expressly ***rejected*** the concept of "local traffic" as any basis for its newly-rewritten rule. Instead, the FCC correctly recognized that on its face Section 251(b)(5) applies to "***all*** telecommunications" that two LECs might exchange. *See ISP Remand Order* at ¶¶ 30-31 (emphasis in original). On its face, therefore, because even VoIP traffic is "telecommunications" when one LEC hands it off in TDM form to another, presumptively reciprocal compensation, not access, would apply.[53]

In the *ISP Remand Order,* the FCC established a separate, parallel compensation regime for ISP-bound traffic, on the ground that such traffic constitutes "information access." *ISP Remand Order* at ¶ 42. Although that ruling was not literally directed to "information access" traffic connecting VoIP providers (as opposed to ISPs) to the PSTN, there is no reason to assume that the FCC would support a different regime for ***this*** form of "information access."

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call will be dialed on a "1+" basis and will be routed to the customer's presubscribed IXC, which will direct the call to the LEC providing the number to the VoIP provider. Level 3 will not receive such calls from Qwest. As noted in our opening brief, Level 3 does not provide "1+" calling. Level 3 Brief at 21. As a result, the only VoIP calls that Level 3 will receive from Qwest are calls that ***are*** dialed locally. Hence, there is no inconsistency.

[53] As noted above, the FCC observed in the *Vonage Order* that VoIP providers who are not themselves telecommunications carriers nonetheless receive telecommunications services from carriers – typically CLECs – who supply the VoIP providers with connectivity to the PSTN. *Vonage Order* at ¶ 8. The fact that this traffic counts as "telecommunications" is also apparent from the *ISP Remand Order.* That order makes clear that Section 251(b)(5) on its face applies to ISP-bound traffic that two LECs might exchange; the only reason that Section 251(b)(5) might ***not*** apply, according to the FCC, is because Section 251(g) acts as a "carve out" or limitation on the scope of Section 251(b)(5). Of course, we know from *WorldCom v. FCC* that Section 251(g) has no such effect. *See infra.*

Indeed, in fairness to the unsettled state of the law here, the *Vonage Order* did not unequivocally hold that VoIP was an "information service," which is the predicate to finding that calls to or from VoIP entities are "information access." The FCC instead found that VoIP traffic was inseparably interstate without determining whether VoIP services were telecommunications or information services. So, if VoIP services are ***not*** information services, then their status for purposes of reciprocal compensation can be determined by looking at the reciprocal compensation rule, 47 C.F.R. § 51.701(b). That rule provides that ***all*** telecommunications traffic is subject to reciprocal compensation, except for "exchange access" and "information access." If VoIP calls are not "information access," then they are subject to reciprocal compensation unless they are "exchange access" – the only other excluded category.

Here is where Qwest's obsolete obsession with geography falls to the ground. "Exchange access" is a specifically defined term in the Communications Act. Under 47 U.S.C. § 153(16), "exchange access" means using a LEC's facilities or services to originate or terminate a "telephone toll service" call. Under 47 U.S.C. § 153(48), for a call to be "telephone toll service," it must meet a two-part test. First, it must indeed be a "long distance" call in the sense of beginning and ending in different local exchange areas. But, second, the call must also be subject to a separate toll charge, not included as part of the customer's local service contract. A call that does not meet ***both*** tests is not and cannot be "telephone toll service." Of course, it is widely known that VoIP providers do not normally assess toll charges; they offer nationwide calling at a single, integrated, flat rate. This means that as a matter of federal law, a LEC's job in handling such traffic is not, and cannot be, the provision of "exchange access." And ***this*** means, as a matter of federal law, that such traffic is ***not*** excluded from the scope of reciprocal compensation.[54]

So, if VoIP traffic is "information access," then the logical conclusion is to extend the FCC's intercarrier compensation regime for ISP-bound traffic to it. That regime is directly parallel to the compensation requirements for "reciprocal compensation" traffic.[55] And, if it is ***not*** "information access," a straightforward reading of the FCC's reciprocal compensation rule, and associated statutory definitions, shows that this traffic is not "exchange access," so reciprocal compensation applies.[56]

This conclusion is confirmed, as noted in Level 3's opening brief, by considering the court's decision in *WorldCom v. FCC.* As noted above, in the *ISP Remand Order* the FCC ruled that Section 251(b)(5) applies to "***all*** telecommunications" *Id.* at ¶¶30-31 (emphasis in original).

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[54] Level 3 emphasizes the requirements of federal law here because the services at issue are jurisdictionally interstate, and because the Commission in deciding open issues in this arbitration is required to follow applicable federal law. Again, this is not intended as a limitation on this Commission's authority to decide this case; rather, it is to emphasize that federal law supplies the rules of decision here. As a result, service definitions in Arizona law or in Qwest tariffs are not relevant to the question at hand. Interestingly, however, in this particular respect Arizona law is completely consistent with federal law. As noted above, the definition of "toll service" in the Commission's rules actually tracks the federal definition, characterizing it as service "between stations in different exchange areas ***for which a long distance charge is applicable.***" Arizona Administrative Code § R14-2-501(23) (emphasis added). So, just like federal law, Arizona law also requires that a call pass both a geographic test and a "separate charge" test in order to count as a "toll call."

[55] As noted in Level 3's Brief (at 58-59), the *ISP Remand Order* specifically rejected the notion that there should be any difference in the compensation payable for "information access" traffic – ISP-bound traffic – and "plain old" traffic.

[56] In this regard, where the terms of the FCC's rules and associated statutes are clear – as they are in this context – it is inappropriate to dig behind the words to find "interpretations" to vary their plain meaning. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843 (1984) (statutes); *In re Sealed Case,* 237 F.3d 657, 667 (D.C. Cir. 2001) ("As the Supreme Court recently stressed ... judicial deference towards an agency's interpretation is warranted only when the language of the regulation is ambiguous.") (internal quotation marks omitted); *Atlas Tel. Co. v. Oklahoma Corp. Comm'n,* 400 F.3d 1256, 1264 (10th Cir. 2005) ("Where the regulations at issue are unambiguous, our review is controlled by their plain meaning."); *Meeks v. West,* 216 F.3d 1363, 1366 (Fed. Cir. 2000) ("In construing a statute or regulation, we begin by inspecting its language for plain meaning. ... If the words are unambiguous, it is likely that no further inquiry is required.") (internal citation omitted).

It then went on to find that two specific types of traffic identified in Section 251(g) – exchange access and information access – were "carved out" from Section 251(b)(5). This, however, is ***precisely*** the legal conclusion that the court in *WorldCom* found to be unreasonable and, therefore, "precluded." The court, however, left the FCC's parallel compensation regime in place because the court believed that the FCC could probably justify establishing it under Section 251(b)(5) and Section 252(d)(2), so there was no point in setting it aside while the FCC gave further consideration to the matter.

This court ruling eliminates any claim that VoIP "information access" traffic is in some kind of compensation limbo. If one were to read the parallel compensation regime in the *ISP Remand Order* as applying only to ISP-bound traffic, and not to interstate "information access" more generally, then the question is whether such "information access" traffic is subject to Section 251(b)(5). Given that the *WorldCom* court has authoritatively held that Section 251(g) does ***not*** act to limit the scope of Section 251(b)(5), the only reasonable conclusion is that Section 251(b)(5) indeed applies to such traffic.[57]

For all these reasons, the best reading of governing federal law is that all VoIP "information access" traffic is subject to normal reciprocal compensation, not access charges. If, however, there is any doubt about this as a legal matter, then Level 3 submits that, to the extent the Commission has discretion as to how to decide, as a policy matter the right answer is to treat VoIP traffic as subject to reciprocal compensation rather than access charges.

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[57] Qwest and Level 3 agree that it is necessary to interpret the *ISP Remand Order* in light of *WorldCom. See* Qwest Brief at 14-15. The difference is that Level 3 focuses on the actual ***holding*** of the *ISP Remand Order* (eliminating reliance on the notion of "local" calling; defining telecommunications subject to reciprocal compensation as all telecommunications that are not "exchange access" or "information access") and the actual ***holding*** of *WorldCom* (carving out "information access" is "precluded" as a reasonable reading of the statute). Qwest, by contrast, takes snips of *dicta* from each ruling in an effort to distract attention from what the FCC and the D.C. Circuit actually ***did.***

Moreover, as noted in Level 3's opening brief (at 43-49), the purpose and legal basis of access charges is to require toll carriers to share their toll revenues with LECs involved in originating or terminating toll calls. There are no toll charges to share in the case of VoIP traffic, so subjecting this traffic to access charges is simply a tax on Level 3, for the benefit of Qwest, as Level 3 seeks to do its part in "rapidly replacing [Qwest's] legacy narrowband circuit-switched network" with IP-based services. *VoIP CALEA Order, supra.* There is no conceivable justification for doing this.[58] The point of the 1996 Act is to encourage competition and the deployment of new technology, not to slow it down by requiring the new provider to pay tribute to the old. Moreover, actually trying to implement Qwest's proposals, which are based on figuring out where the conversion from TDM to IP (or vice versa) takes place, is administratively unworkable. As technology evolves, the location of that conversion may well vary from provider to provider or even from call to call. This Qwest proposal is simply a way to slow down the conversion to new technology.[59]

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[58] Qwest claims (Qwest Brief at 7) that Level 3 seeks a ruling "that access charges do not apply to any Level 3 traffic in Arizona." As noted in Level 3's opening brief, however, Level 3 recognizes that access charges properly apply to "telephone toll service" calls, including where Level 3 hands off so-called "IP-in-the-middle" traffic to Qwest. *See* Level 3 Brief at 11 n.15. Level 3 and Qwest plainly disagree about when access charges apply, but it is simply wrong to claim that Level 3 is seeking some blanket exemption from such charges. Instead, Level 3 is seeking a ruling, consistent with the applicable provisions of federal law, that access charges do not apply to traffic that is not "exchange access."

[59] Qwest itself recognizes, if only implicitly, how difficult this will be, in that it proposes to include elaborate and intrusive "audit" requirements on Level 3 so that it will, in theory, be possible to go back after the fact and check where the IP-TDM conversions took place. *See* Qwest Brief at 50. These requirements should be rejected because Qwest's entire approach to this issue is wrong, for the reasons described above. Indeed, these audit requirements are sufficiently burdensome and intrusive to warrant rejection on their own terms, even if the location of the TDM-IP conversion is deemed relevant. Moreover, Qwest witness Brotherson admitted that the provisions gave Qwest the sole ability to re-rate traffic and that Qwest would have a financial incentive to rate traffic as toll rather than VoIP or local forcing Level 3 to be the guarantor of Qwest's access revenues. TR at 332-336.

### C. Definitional Issues.

In addition to the policy and legal disagreements noted above regarding VNXX routing and intercarrier compensation, Qwest and Level 3 disagree about the definitions of certain terms that are relevant to those issues. *See* Qwest Brief at 32-37. For the reasons described below, the Commission should adopt Level 3's proposed definitions and reject Qwest's.

"*Interconnection.*" (*See* Qwest Brief at 33-34.) Qwest proposes an unreasonably limited definition of "interconnection" that is inconsistent with the applicable federal rule. Level 3, by contrast, proposes a definition that is consistent with that rule. Here are the two parties' competing definitions (from Matrix Issue No. 10):

| Level 3 | Qwest |
|---|---|
| "Interconnection" is the physical linking of two networks for the mutual exchange of Telecommunications, which includes but is not limited to Telephone Exchange Service, Exchange Access traffic, Telephone Toll traffic, ISP-Bound Traffic and any Information Services traffic such as VoIP. | "Interconnection" is as described in the Act and refers to the connection between networks for the purpose of transmission and routing of telephone Exchange Service traffic, IntraLATA Toll carried solely by local exchange carriers, ISP-Bound traffic and Jointly Provided Switched Access traffic. |

Level 3's definition closely tracks the definition in FCC Rule 51.5, which states that "*Interconnection* is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic." Note that the FCC's definition places no limitations on the ***type*** of traffic that may or should be exchanged. It refers only to the exchange of "traffic." Consistent with this federal rule, Level 3 proposes that interconnection refer to the linking of networks for the exchange of "telecommunications" (which Level 3 believes to be included within the FCC's general term "traffic"), and then – for the avoidance of doubt, but not for purposes of limitation – lists several ***types*** of traffic that would be included.

By contrast, Qwest's definition ***is*** limiting. It states that "interconnection" refers to connecting networks for the purpose of exchanging certain specific classes of traffic, with none others provided for. There is no support in the FCC's rules or elsewhere for this limiting construction. The Commission, therefore, should adopt Level 3's language.[60]

*"Interexchange Carrier," "Telephone Toll Service,"* and *"IntraLATA Toll Traffic."* (*See* Qwest Brief at 34-37.) The parties' competing definitions of "Interexchange Carrier" are similar, but the distinction between them matters. (*See* Matrix, No. 11) Level 3 would define an "interexchange carrier" as "a carrier that provides Telephone Toll Service." "Telephone Toll Service" would also be defined in the agreement by exactly tracking the definition of that term in federal law. (Matrix, Issue No. 15.) Level 3, therefore, would tie the terms of the agreement exactly to federal law, which is what this Commission is legally bound to do if the parties do not agree. *See* 47 U.S.C. § 252(c)(1). Qwest, by contrast, would define "Interexchange Carrier" as an entity that provides "InterLATA or IntraLATA toll services" – which would be fair enough, except that Qwest's proposed definitions of ***those*** terms are ***not*** consistent with federal law. (*See* Matrix, Issue No. 12.) As discussed in Level 3's opening brief and above, to constitute

60 Qwest claims that Level 3 is violating the *ISP Remand Order* by including ISP-bound traffic within the scope of the agreement's definition of "telecommunications." *See* Qwest Brief at 33-34. As discussed above, however, the only basis for carving ISP-bound traffic out of the definition of "telecommunications" is the fact that Section 251(g) of the Act mentions "information access," which the FCC took to be a reason to exclude such traffic from the term "telecommunications" as used in Section 251(b)(5). This "carve out," however, is precisely what the D.C. Circuit found to be "precluded" as a matter of law in the *WorldCom* case. There is therefore no basis to exclude it now, more than three years after *WorldCom* was decided and more than two years after the 9th Circuit recognized, in the *Pacific Bell* case, that the Section 251(g) carve-out is invalid. As that court stated, the Section 251(g) argument "was explicitly rejected by the D.C. Circuit. *See WorldCom, Inc.*, 288 F.3d at 430. Although the D.C. Circuit did not vacate the *FCC Remand Order* when it found that the FCC's 'reliance on § 251(g) [was] precluded[,]' its explicit rejection of the FCC's use of § 251(g) as a justification for excluding ISP calls from reciprocal compensation provisions ***defeats ... arguments that rely on § 251(g).*** " *Pacific Bell, supra,* 325 F.3d at 1131 (emphasis added). Qwest is simply trying to resurrect the "precluded" Section 251(g) argument through the back door.

"Telephone Toll Service," a call must meet both a geographic test – it must be "long distance" – and a pricing test – there must be a toll charge. *See* Level 3 Brief at 46-47. Qwest's proposed definitions, however, ignore federal law by using only the geographic test. That is, under Qwest's proposed definition, a call is a "toll" call any time it crosses a local calling area boundary – even if there is no "toll" actually associated with the call. This is contrary to applicable federal law.

Clearly, Level 3's definition tracks federal law, while Qwest's does not. Level 3's definition, therefore, should be adopted.

*"Exchange Service"* and *"Telephone Exchange Service."* (*See* Qwest Brief at 36-37.) Level 3 does not propose a definition of "Exchange Service." Instead, it proposes a definition of "Telephone Exchange Service" – a word-for-word rendition of the term as it is used in the Communications Act. (*Compare* 47 U.S.C. § 153(47) (defining "telephone exchange service") *with* Matrix Issue No. 14 (Level 3 language identical).) Qwest proposes a purely geographic definition of "exchange service" that is not consistent with federal law. Specifically, while ***part of*** the federal law definition of "telephone exchange service" contains a geographic component (specifically, subpart "A"), the federal definition contains an additional, broader provision. This is subpart "B." That provision states that "telephone exchange service" includes not just traditional geographically-limited "local" service, but also any "comparable" service.

In other words, the federal definition expressly recognizes that under the new competitive regime established by the 1996 Act, the old, limited definition of "exchange"-based services had to be expanded, flexibly, to accommodate new developments and new offerings. Level 3 believes that its agreement with Qwest should conform to the federal definition precisely because Level 3 offers new, flexible services that – while not identical to traditional "exchange service" –

are reasonably comparable to it, and should be included within that definition. By proposing to vary from the applicable definition in federal law, Qwest is simply seeking to deny Level 3 the flexibility the statute provides. Here again, the Commission is bound to impose contractual terms that comply with the federal statute. *See* 47 U.S.C. § 252(c)(1). It follows that Level 3's definition, which tracks federal law, should prevail.

## II. LEVEL 3 IS ENTITLED TO A SINGLE POI PER LATA AND IS NOT RESPONSIBLE FOR QWEST'S TRAFFIC ORIGINATION COSTS.

Qwest gives remarkably short shrift to issues of network interconnection architecture. In Qwest's view, the issue "is not about a single point of interconnection ('SPOI') within the LATA. It is about compensation for the use of Qwest's network." Qwest Brief at 51. What Qwest really means by this is that Qwest knows, legally, that Level 3 is entitled to a SPOI, but ***operationally*** Qwest wants to undermine that right in any way it can. The Commission should see through this approach and refuse to let Qwest undermine Level 3's rights. Instead, the Commission should adopt Level 3's proposed contract language regarding the SPOI, laid out in Level 3's initial brief.[61]

Given Qwest's exceedingly brief discussion of physical network architecture issues, Level 3 submits that the Commission should view Qwest as having effectively conceded the

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[61] Qwest claims that Level 3's proposed language regarding interconnection locations should be rejected because "there are no other places within Qwest's network where traffic may be exchanged," other than tandem switches and end office switches. Qwest Brief at 53. But this is both contrary to the statute and technically wrong. The statute states that interconnection may occur at "any technically feasible point." 47 U.S.C. § 251(c)(2). While it is obviously technically feasible to exchange traffic at tandem and end office switches, it is equally obviously feasible to splice fiber together at some other mutually agreeable and technically feasible location. In this regard, the FCC's rule on this topic states that interconnection shall occur at "any technically feasible point" on the ILEC's network, "including, ***at a minimum,***" locations including end office and tandem switches. 47 C.F.R. § 51.305(a)(2) (emphasis added). There is no way to square Qwest's unsupported statement that interconnection may "only" occur at those two locations when the applicable FCC rule indicates that those two locations constitute a "minimum" set of interconnection points.

point – discussed extensively in Level 3's opening brief (at 14-19) – that Level 3 is, indeed, entitled to a single physical POI per LATA and should take steps to ensure that Level 3's right is meaningful.[62]

### A. Traffic Origination Charges – ISP-Bound And VoIP Traffic.

Level 3 and Qwest obviously disagree with respect to issues of compensation. Basically, it appears that Qwest seeks the right to charge Level 3 for the privilege of receiving certain traffic from Qwest's end users. Specifically, while Level 3 explained that FCC Rule 51.703(b) bars Qwest from charging Level 3 for telecommunications traffic that Qwest sends to Level 3, Qwest says that that rule does not apply to ISP-bound (or, presumably, VoIP) traffic. Qwest, therefore, wants to be able to charge Level 3 for that traffic. *See* Qwest Brief at 52-53.

Here is Qwest's logic: The FCC's reciprocal compensation rule (Rule 51.701(b)) says that "telecommunications traffic" means all telecommunications other than exchange access and information access. 47 C.F.R. § 51.701(b). The "no origination charges" rule (Rule 51.703(b)) says that a LEC may not charge another LEC for "telecommunications traffic" that originates on the first LEC's network. Therefore, according to Qwest, the "no origination charges" rule does not apply to information access, and Qwest can charge Level 3. *See* Qwest Brief at 53-55.[63]

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[62] Level 3 explained in its opening brief that there should be no issue of Qwest imposing traffic origination charges – including trunking or facilities charges – given that the parties will be establishing "meet point interconnection" arrangements. Level 3 Brief at 26. Qwest's proposed contract language, however, as well as its brief, suggests that Qwest will try to impose originating facilities charges on Level 3 even with a meet point POI in place. The Commission should confirm that with a meet-point POI, no traffic or facilities origination charges should apply. Such a clear and explicit ruling would largely moot the parties' dispute on this issue. Even so, as described below, Qwest is wrong even if the existence of a meet-point POI did not automatically, in and of itself, eliminate such charges.

[63] Interestingly, when the question is reciprocal compensation, Qwest relies heavily on state-level regulatory definitions to try to avoid the plain meaning of binding federal rules and rulings. *See* Section I of this reply brief, *supra*. But when the question is the definition of "telecommunications" for purposes of Qwest's right to apply traffic origination charges, Qwest says nothing about state law. Perhaps this is because it knows that the Arizona Administrative Code defines "telecommunications service" as "Any

This logic is wrong for several reasons. First, it has been rejected by at least two courts that have considered it. For example, the Fourth Circuit in *MCI Metro Access Transmission Servs. v. BellSouth Telecommunications, Inc.*[64] held that FCC Rule 51.703(b) "unequivocal[ly] prohibit[s] LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions." Moreover, this exact issue was recently litigated between Qwest and a CLEC called "Universal" in federal district court in Oregon. Qwest argued in that case that Universal owed Qwest for facilities used to bring traffic to Universal's single POI in each LATA, but the court, citing the binding federal rules noted above, rebuffed Qwest's claims:

> In the instant case, 100% of the traffic exchanged between the parties originated on Qwest's network and terminated on Universal's. Under § 51.703(b) and § 51.709(b), Qwest may not impose charges on Universal for facilities used solely to exchange one-way traffic that originated on Qwest's network and terminated on Universal's network. For these reasons, Qwest's claim as to the charges for LIS circuits, DTT, EF, and MUX interconnection facilities fails.[65]

This court reached this conclusion – that FCC Rule 51.703(b) prohibits origination charges – with full knowledge and awareness of the fact that the traffic Qwest was originating to the CLEC in that case was, essentially entirely, ISP-bound.[66] This confirms – if any confirmation was needed – that ISP-bound traffic is not subject to some unspoken exception to rule 51.703(b)'s clear ban on charging for traffic origination. Indeed, in the Fourth circuit's *MCIMetro* decision

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transmission of interactive switched and non-switched signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, lightwave, or any other electromagnetic means (including access services), which originate and terminate in this state and are offered to or for the public, or some portion thereof, for compensation." Under this broad definition, calls to ISPs, VoIP traffic, VNXX traffic – indeed, ***any*** kind of traffic – would plainly "count." In fact, Qwest is correct that this is a federal-law, not a state-law issue (it just misreads and misapplies federal law). But, as discussed above, the intercarrier compensation status of ISP-bound, VoIP, and VNXX traffic is ***also*** a federal issue. Qwest's inconstant devotion to state-level regulatory material shows the opportunistic, inconsistent nature of its arguments in this case.

64 352 F.3d 872 (4th Cir. 2003).

65 *Qwest Corp. v. Universal Telecom, Inc.*, 2004 U.S. Dist. LEXIS 28340 at *14-15.

66 Qwest v. Universal at *2, *12-14.

noted above, ISP-bound traffic was also clearly at issue between the two carriers.[67] So there is simply no sound basis for assuming that Qwest ***is*** allowed to assess origination charges for ISP-bound and other information access traffic.[68]

Qwest's logic is also contradicted by the *ISP Remand Order* itself. The *ISP Remand Order* considered the problem of regulatory arbitrage created by applying high reciprocal compensation rates to large volumes of calling to ISPs served by CLECs, and created a balanced regime to end that arbitrage: treat ISP-bound and reciprocal compensation traffic the same, with the actual payment level either high (reciprocal compensation) or low (FCC capped rates, currently only $0.0007 per minute) at the choice of the ILEC. *ISP Remand Order* at ¶¶ 77-92. The FCC specifically rejected the notion that any ***different*** compensation regime should apply to ISP-bound, as compared to "normal," traffic. *Id.* at ¶¶ 89-92.[69] Yet that is exactly what Qwest is trying to impose here: a regime in which it gets to charge for origination in the case of ISP-bound traffic, but not for "normal" traffic. This would plainly be contrary to the actual ruling of the FCC in the *ISP Remand Order,* as just discussed.[70]

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[67] *MCI Metro Access Transmission Servs. v. BellSouth Telecomms., Inc.* 352 F.3d 872 (4th Cir. 2003); decisions below N.C. PUC LEXIS 398 (NCUC 2001) *and* 2001 NC PUC LEXIS 821 (NCUC 2001).

[68] To the extent that other regulators have held that Qwest ***can*** charge origination charges for this type of traffic, Level 3 submits that those rulings, with due respect, are erroneous.

[69] The only significant differences between compensation for the two types of traffic in the *ISP Remand Order* were the so-called "new market" restriction and the "growth caps." Both of these differences were removed with the issuance of the *Core Forbearance Order.* In re Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, *Order*, 19 FCC Rcd 20179 (FCC rel. Oct. 18, 2004).

[70] For reasons which are unclear, Qwest misstates the FCC's "mirroring" rule in the *ISP Remand Order. See* Qwest Brief at 8-9. Under that rule, the ILEC has a choice: it can either offer to exchange all non-access traffic in both directions, including ISP-bound traffic, at the low FCC rate of $0.0007; or it can offer to exchange all such traffic, including ISP-bound traffic, at the state-determined reciprocal compensation rate. *ISP Remand Order* at ¶¶ The choice of which rate to offer is the ILEC's not the CLEC's. The point of this arrangement is to prevent ILECs from paying or receiving different rates for ISP-bound and non-ISP-bound traffic, while giving the ILEC the choice of whether to pay a higher or

In addition, allowing Qwest to impose such origination charges would make no sense. As discussed in Level 3's initial brief, the "cost causer" in the case of calls to ISPs or VoIP providers is not the ISP or VoIP entity, it is the Qwest end user making the call.[71] Qwest has recovered (or has the opportunity to recover) its extremely modest call origination costs from those end users.[72] It would be unfair – a form of double recovery – to allow Qwest to also charge Level 3 for that same function.[73]

In this regard, the ***most*** that Qwest's argument for a special exemption from Rule 51.703(b) could show is that origination charges for this type of traffic are not already affirmatively banned by the FCC's rules – although, as just discussed, they are. Assuming *arguendo* that such charges are not affirmatively banned, that does not remotely suggest that

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lower rate for all traffic. *See id.* at .¶ 90. Given that Level 3 expects to be a net recipient of traffic from Qwest, Level 3 would prefer to receive the higher rate – $0.00097 per minute – on all traffic Qwest sends to Level 3. But the choice of which rate to apply – uniformly, to all non-access traffic in each direction – lies with Qwest.

71 *See* Qwest Brief at 1 (characterizing its own end users, who pay for the right to make calls, as "customers of ISPs on Qwest's network"). Qwest later grudgingly acknowledges that these subscribers really are its own customers. *Id.* at 5, 26. But nowhere does Qwest acknowledge that those Qwest customers pay Qwest for the service of delivering locally-dialed calls where they are supposed to go – that is, that Qwest is already compensated for getting ISP-bound calls to Qwest's POI with Level 3.

72 *See* Level 3 Brief at 18-19, 30-31 (noting that callers are cost causers and that Qwest's transport costs are *de minimis*). *See also Texcomm, Inc. v. Bell Atlantic, Memorandum Opinion and Order* 16 FCC Rcd 21493 (2001) at ¶¶ 6, 10 (describing FCC's intercarrier compensation rules as placing cost responsibility on calling parties, as cost causers).

73 The Commission should reject Qwest's claim that the ISPs or VoIP providers Level 3 serves are really the cost causers, because the callers are also customers of those entities. *See, e.g.,* Qwest Brief at 2, 15, 28. Qwest has simply discovered that business customers use telephone service. On Qwest's logic, it should be allowed to charge origination charges any time an end user calls an entity – a law firm, a pizza delivery service, a government agency – that provides services to the calling party. Qwest's claim is equivalent to saying that if a new store opens that attracts a lot of customers, the store should have to pay for the wear and tear on the roads that the customers use to reach the store. In fact, the customers are responsible for their use of the roads. In the case of real roads, the customers pay through their gasoline and other taxes. In the case of the Qwest-provided "road" to the ISP "stores" on Level 3's network, Qwest's own local calling rates are intended to, and do, cover the *de minimis* cost of transporting traffic from the customer's originating end office to the POI, as well as the FCC's low $0.0007 rate for call termination.

such charges are fair, or reasonable, or in any respect a good idea. For the reasons discussed above, they are a bad idea, and – to the extent that the Commission could, hypothetically, impose them – it should reject them.

**B. Traffic Origination Charges: Miscalculating The RUF.**

As Level 3 anticipated in its opening brief (at 26-27), Qwest argues that under FCC Rule 51.709(b), ISP-bound and other information access traffic should not be "counted" for purposes of calculating Qwest's "relative use factor," or "RUF." Qwest Brief at 52-53. As Level 3 explained, the entire logic of Qwest's RUF is wrong. Qwest's language says that Level 3 pays full freight for facilities used to connect the two networks – including direct trunks entirely within Qwest's pre-existing network! (*see* Qwest Brief at 51 (claiming entitlement to payment for costs on Qwest's side of the POI)) – but that Level 3 can earn a discount off that full price to the extent that Level 3 sends traffic to Level 3. Qwest then says that in earning its discount, Qwest-originated ISP-bound and other information access traffic doesn't count. Qwest Brief at 56.

As Level 3 explained in its opening brief (at 26-33), the governing FCC rule works in exactly the opposite way. When Qwest provides internetwork facilities, Qwest is fully and completely responsible for the costs of those facilities. Qwest, however, is allowed to charge Level 3 – but only if, and only to the extent that, Level 3 sends traffic on those facilities to Qwest. The rule does not say that Qwest can charge Level 3, but that those charges should be reduced by traffic Qwest sends to Level 3. The rule says that Qwest cannot charge Level 3, except to the extent that Level 3 sends traffic to Qwest.

To avoid any doubt, here is what the rule says (emphasis added):

> (b) The rate of a carrier providing transmission facilities dedicated to the transmission of ***traffic*** between two carriers' networks shall recover ***only*** the costs

> of the proportion of that trunk capacity ***used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.*** Such proportions may be measured during peak periods.

This provision is not remotely unclear or ambiguous. Qwest "shall recover ***only***" the proportionate cost of trunk capacity it supplies between Level 3 and Qwest that ***Level 3*** uses "to send traffic that will terminate on" Qwest's network. This rule gives Qwest no right whatsoever to charge Level 3 for capacity between the two networks in the abstract. To the contrary, by saying that the carrier providing such capacity "shall recover ***only***" the costs of that capacity that the interconnected carrier actually uses, the rule affirmatively ***forbids*** Qwest from imposing trunking charges on Level 3 in the manner Qwest seeks to do by means of its RUF calculation.

The emphasized word "traffic" in the rule above also destroys Qwest's claims about the RUF. The only vaguely legal basis for Qwest's erroneous RUF calculation – which, in effect, would force Level 3 to pay for the trunking capacity Qwest uses to get Qwest-originated ISP-bound traffic to Level 3 – is the fact that in Rule 51.701(b), the FCC defines "telecommunications traffic," for purposes of reciprocal compensation to exclude "information access," and, therefore, ISP-bound traffic. And, indeed, in some places the FCC makes specific reference to its defined term "telecommunications traffic." But in Rule 51.709(b), governing charges for internetwork trunking, the FCC pointedly did ***not*** use that term. Instead, it used the broader, more general term "traffic." The only logical conclusion is that with respect to internetwork trunking, the FCC did not care whether the traffic being exchanged was, or was not, subject to reciprocal compensation. Instead, it declared directly that an interconnecting carrier like Level 3 can only be charged for the proportionate amount of capacity ***it sends to Qwest.*** It simply does not matter what ***kind*** of "traffic" Level 3 sends to Qwest; Level 3 has to pay for what ***it uses.*** Under no circumstances, however, is it lawful for Qwest to charge Level 3 for capacity that ***Qwest*** uses in getting traffic – any kind of traffic – to Level 3.

Level 3 of course is aware of the cases Qwest cites in which other regulators have ruled that Qwest could apply its illegal RUF calculation and impose what amount to traffic origination charges on interconnected carriers. We submit that the plain language of FCC rule 51.709(b) compels the conclusion that those decisions are, in a word, wrong.

Indeed, at least one of the jurisdictions now realizes that its earlier decision was wrong. In the *Wantel* case cited earlier, the Oregon PUC disavowed its earlier view of the RUF:

> [T]he [Oregon] Commission's decision to exclude ISP-bound traffic from the RUF was informed by the FCC's finding in the *ISP Remand Order* that ISP-bound traffic was not 'telecommunications' subject to the reciprocal compensation requirements of §251(b)(5), but rather 'information access' within the scope of §251(g) of the Act. The FCC's legal determination, as we now know, was subsequently rejected by the D.C. Circuit in *Worldcom v. FCC.* Since an important legal rationale underlying the decision in Order No. 01-809 to exclude ISP-bound traffic from the RUF ***has been found to be contrary to federal law,*** it cannot provide a basis for interpreting the Pac-West/Qwest ICA.

*Wantel, supra* at 32-33 (emphasis added).

In these circumstances, it would be reversible error for this Commission to follow the jurisdictions that have not yet realized – as Oregon has – that federal law does not support Qwest's effort to override the plain language of the applicable FCC rule.

## III. MISCELLANEOUS ISSUES.

### A. Separate Feature Group D Trunks.

Qwest says that any switched access traffic the parties exchange should be sent over Feature Group D trunks, not Qwest's "local interconnection service," or "LIS" trunks. Qwest Brief at 54-56. This means that if Level 3 wants to have an efficient interconnection with Qwest that groups technically equivalent but regulatorily distinct traffic "types" on a single set of trunks, Level 3 would have to use an FGD network, not a LIS network.[74] Level 3 explained at some length in its opening brief why it makes sense to permit the parties to use a single interconnection network, based on Qwest's "local interconnection service," or LIS, trunks, to carry all the traffic the parties will exchange. *See* Level 3 Brief at 34-40. Level 3 incorporates that discussion by reference.

Qwest raises only one legal argument against this conclusion that Level 3 has not already dealt with in its opening brief. That is the absurd claim that somehow Section 251(g) of the Act somehow ***requires*** that FGD trunks be used to carry access traffic. Qwest Brief at 55-56. According to this logic, Section 251(g) requires that Qwest "provide interconnection for the exchange of switched access traffic in the same manner that it provided interconnection for such traffic" before the 1996 Act. *Id.* That, however, is not what Section 251(g) says. That section says that "the same equal access and nondiscriminatory interconnection restrictions and obligations" that applied before the Act continue to apply. In other words, Qwest can't stop providing equal access, or start discriminating among carriers, now that the 1996 Act has passed.

Of course, Qwest fully meets this requirement simply by having its nondiscriminatory FGD tariff offerings on file and available to all carriers. Nothing in Section 251(g) says that "local" interconnection under Section 251(c)(2) of the Act cannot carry exchange access traffic. To the contrary, as Level 3 pointed out in its opening brief, Section 251(c)(2) expressly requires that Qwest establish new interconnections under that section "for the transmission and routing of … exchange access." Given that interconnection under Section 251(c)(2) expressly and unambiguously includes "exchange access," it is simply absurd to claim, as Qwest does, that

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[74] This would be required because, under Qwest's logic, the access traffic is, in effect, *persona non grata* on the LIS trunks.

trunks set up for interconnection under Section 251(c)(2) ***cannot*** be used for the transmission and routing of exchange access. The Commission should reject Qwest's arguments on this point and direct Qwest to permit Level 3 to interconnect using a single, efficient network of interconnection trunks.

**B. Issues Regarding Ordering Trunks.**

Level 3 has proposed language in the agreement that would clarify that the mere "ordering" of trunks for administrative purposes would not affect which party is actually responsible for the costs of those trunks (proposed sections 7.4.1.1 and 19.1.1). Instead, cost responsibility would be entirely dealt with in the sections of the agreement dealing with cost responsibility. Qwest objects to these proposals. *See* Qwest Brief at 58-59.

The discussion above and in the parties' opening briefs shows that Qwest and Level 3 indeed disagree about cost responsibility. Obviously the Commission's decision on the merits of that issue will govern which party pays the other, and how much, for any trunking between them that might be established.

Level 3 submits, however, that the fact that the parties are at such loggerheads with respect to the substantive question of cost responsibility shows why Level 3's language is necessary. Whatever decision the Commission reaches on the substantive issue, the implementation of that decision under the agreement should not be clouded or confused in any way as a result of which party is assigned by the agreement to take on the administrative task of "ordering" the trunks needed to keep traffic flowing. For this reason, while Level 3 obviously urges the Commission to decide in Level 3's favor on the merits, no matter what the Commission decides, Level 3's language in sections 7.4.1.1 and 19.1.1 is appropriate.

## C. Definition of "Call Record."

At page 56 of its brief, Qwest notes that the parties disagree about the definition of "call record." This issue matters because, in the guise of fighting over a technical definition, Qwest is attempting to interfere with Level 3's ability to offer IP-based services. Specifically, it appears to Level 3 that Qwest's proposed definition of "call record" would require the provision of information that may not always be available in connection with VoIP-originated calls. As a result, Qwest's proposal would at best impose substantial administrative costs on Level 3 and its VoIP customers in an effort to conform to the unreasonable definition, while at worst, Level 3 is concerned that Qwest might be trying to set the stage for accusing Level 3 and others of inappropriate "call laundering" of VoIP traffic, when all that is actually occurring is that VoIP-originated traffic does not automatically come with the kind of information that is generated by traditional circuit switches originating a call.

This issue will have less practical significance if, as Level 3 has requested, the Commission imposes a uniform intercarrier compensation obligation of $0.0007 per minute with respect to all VoIP traffic. Within such a regime, the specific details associated with individual calls are less important than under Qwest's proposed system that ties compensation to call geography in essentially all cases. That said, no matter which way the Commission decides that more fundamental issue, Level 3 submits that its more flexible definition of what constitutes a "call record" for purposes of the agreement should be adopted, in order to accommodate the growth of VoIP traffic and to minimize potential disputes between the parties.

## D. Signaling Parameter.

At page 58 of its brief, Qwest notes that the parties disagree about certain signaling parameters to be included in SS7 messages the parties exchange. This issue is related to the "call record" issue just discussed. Qwest seeks to impose a definition of an SS7 message that does not embrace the broader scope of information that SS7 signaling can contain – including, specifically, information that could be used to distinguish VoIP from non-VoIP traffic, to the extent that this would be needed. The Commission should adopt Level 3's proposed language, which is more flexible than that of Qwest and which is therefore more appropriate as IP-enabled services become more prevalent.

### E. Issue No. 19 (Language Regarding 3:1 Ratio for ISP-Bound Calling).

Qwest objects to a single sentence in Level 3's proposal for Section 7.3.6.2 of the contract. Level 3 stated that "Traffic exchanged that is not ISP-bound traffic will be considered to be section 251(b)(5) traffic." *See* Qwest Brief at 38-39. Qwest's concern is that there will obviously be some traffic that the parties exchange that is ***not*** subject to Section 251(b)(5), but, rather, is subject to access charges. As noted earlier, Level 3 acknowledges that there will be some traffic it sends to Qwest that is subject to switched access charges. However, because Level 3 itself is not a "1+" toll carrier, it will never be in a position of paying originating access charges. *See* Level 3 Brief at 21. Qwest obviously believes that Level 3's obligation to pay access charges is more extensive than Level 3 believes. Putting that disagreement aside, however, Qwest is correct that the sentence to which it objects is too broad. Level 3 suggests that the best way to resolve this is to replace the words "Traffic exchanged…" with "Traffic sent from Qwest to Level 3…". This would make clear that Level 3 is not attempting to avoid paying terminating access charges with respect to toll traffic it sends to Qwest, but would not erroneously result in Level 3 being assessed access charges on Qwest-originated traffic.

## IV. CONCLUSION.

For the reasons described above and in Level 3's opening brief, the Commission should accept Level 3's positions on the issues in dispute between Level 3 and Qwest. Specifically, the Commission should rule: (a) that Level 3 may interconnect with Qwest at a single POI per LATA; (b) that Qwest may not charge Level 3 for originating traffic to Level 3, either on a per-minute basis, a per-facility basis, or on the basis of a "relative use factor"; (c) that all traffic types may be combined on "local" interconnection trunks; (d) that Level 3 may use VNXX routing for its ISP-bound and VoIP traffic; and (e) that the intercarrier compensation rate for all traffic shall be $0.0007 per minute, other than true telephone toll service traffic, to which access charges apply. Level 3's contract language implements these reasonable conclusions and should be adopted.

Respectfully submitted this 2nd day of December, 2005.

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Attachment #1

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE:

LEVEL 3 COMMUNICATIONS, LLC.,

Petitioner,

vs.

QWEST CORPORATION,

Respondent.

DOCKET NO. ARB-05-4

VOLUME II

Hearing Room
350 Maple Street
Des Moines, Iowa
Wednesday, August 31, 2005

Met, pursuant to notice, at 9:00 a.m.

COPY

BEFORE: THE IOWA UTILITIES BOARD

JOHN NORRIS, Chairman
DIANE C. MUNNS, Board Member
ELLIOTT G. SMITH, Board Member

(Pages 560 through 893)

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country, they can do so by obtaining local exchange service and no access charges will apply when some people in Omaha call that Omaha number and then the enhanced service provider changes the net protocol and sends it out over the Internet to points unknown.

Q. Let me dig a little deeper, and I think we've talked about some of this in the answers you were just giving. I want to talk a little bit more back to your starting point about the 100-year-old convention.

When this convention started a hundred years ago, would you agree with me that society was much less mobile than it is now?

A. Yes.

Q. And, in fact, telephony devices are certainly much more mobile now than they were a hundred years ago?

A. Certainly.

Q. Did Level 3 have any say in how the convention was established that you refer to?

A. No.

Q. Now, in your rebuttal at page 37 and in more detail perhaps at page 39, I believe you testified that geography-based NXXs are important of Management and Budget.

Q. Does Qwest consider Ames and Boone to be a community of interest?

A. Qwest considers Ames and Boone to be two local calling areas as defined by the Iowa Board.

Q. Is it possible--

A. They could have commonality, but for purposes of defining local calling areas, they are separate local calling areas.

Q. Is it possible there is more interaction between Ames and Boone now than there was when the hundred-year-old convention was established?

A. We can speculate, but, yes.

Q. And if we were starting from scratch today, it might be logical to think of Ames and Boone as a community of interest for local calling purposes?

A. Well, that would be a factor if Ames and Boone even today without having to start over could always say we would prefer to be one local calling area, recognizing that that would result perhaps, and I'm not--we're just hypothetical-- that would probably result in a lost toll revenue, an offset of that, which means you get a higher local calling area charge for which you get a larger local calling area that would include both Boone and Ames. Whether the people in those communities would feel that that was something that they wanted to do and wanted the Board to do would be, I guess, something we could speculate about.

Q. Customers in Ames and Boone can call each other locally from a cell phone today, can't they?

A. Yes, they can.

Q. And the whole point of the wireless phone is that you break--or the mobile wireless phone is that you break geographical bounds with it, correct?

A. I'm not sure what you mean by break. The cell phones have their own geographical boundaries, and for calls outside of what is their defined local calling area they also have access charges that apply, so it is simply the geographical boundary that defines what is included in the local calling area versus what is outside of a local calling area for which access--the access regime, either the intrastate or interstate would apply.

Q. But the point of mobility is that when I'm calling on my cell phone and driving down the it your position that Qwest is asking for that to be the case?

A. No.

Q. But it is--

A. That's just the way you asked the question and it caused me to pause.

Q. I just wanted to check. But it is Qwest's position that unless there's some physical presence in each LCA, that VoIP calls to or from that LCA will be subject to access charges, correct?

A. Yes, it would be our position that if it is a call from--we've used different towns here today, but if it is a call from someone in Mason City to someone in Des Moines, that that's not a local call, that there needs to be some presence that--something that constitutes a presence for it to qualify as a local call.

Q. I want to go back a bit to the discussion we had earlier about OneFlex. Would it be fair to say that OneFlex allows a customer to define their own community of interest based on nongeographical relationships, family, friendships by signing up for virtual numbers that allow local calling to the customer in areas that the customer doesn't live in?

A. Sure. I would say that's a way that you could use the Internet to facilitate that or accomplish that.

Q. I want to turn to your rebuttal at page 54, and beginning at line 15 there, you are giving an example of how Level 3 would help an ISP provide a local dial-up number for customers wanting to get to the Internet, is that correct?

A. Yes.

Q. And you say at line 24 and 25 that other than the telephone number there is nothing remotely local about the call. Is that your testimony?

A. That's my testimony.

Q. Now, in Qwest's OneFlex offering with the virtual number option we talked about earlier, the customer in Denver isn't locally to be found in Omaha, are they--the Qwest OneFlex customer in Denver?

A. The customer in Denver who is buying from the Internet provider is not in Omaha, but the VoIP presence obtains local connections in Omaha in order to obtain the Omaha number.

Q. Now, when you're talking about OneFlex talking about loose trunks, or feature group D trunks?

Q. I'm talking about--well, actually let me clarify first and let me ask you what your recollection is with this clarification: For purposes of our discussion, let's simplify Iowa by one step, because I think that a complicating matter is that INS was involved in some of those call paths and not in others.

But in general would you agree with my characterization that one of the issues was rural ILECs were alleging that you were delivering mixed jurisdictional traffic to them over--and let me just start with a common set of trunks?

A. I do recall that being an issue. The trunks or interconnection of trunks that were established with ILECs go back about as far as the establishment of local calling areas in Dubuque; so those trunking connections are the way that they were featured back then.

We don't, unless they venture into other businesses, normally have an LIS connection with independents at this time. Qwest and the independents don't necessarily agree as to whether they're subject to the Telecom Act, and that's not been an issue pressed to date.

Q. Have you kept up with all the twists and turns in that case since you were last participating in it?

A. Absolutely not.

Q. That's very fortunate for you. Are you at all familiar with a case called East Buchanan Telephone Cooperative?

A. No.

Q. This is a great opportunity for you to get that pleasure. I doubt you'll be surprised to know that the case has continued long since your last involvement in it.

A. But they all seem to have the same attorney associated with them.

MR. DUBLINSKE: All the way around the tables unfortunately.

(Petitioner's Exhibit No. 301 was marked for identification.)

Q. I would represent to you that exhibit marked 301 is the direct testimony of Thomas Staebell.

A. Staebell.

Q. I assume you know Mr. Staebell?

A. I do know Tom Staebell.

Q. From Qwest in dockets FCU-04-42 and 04-43. And as we turn to page 2, this is his direct testimony. Would you agree with me that that is what this exhibit appears to be?

A. Yes.

Q. On page 2 of the testimony, at the bottom on line 21 there is a question "What is transit traffic?" Do you see that question?

A. I do. I see it.

Q. I was trying to figure out how much of this I can simplify.

Could you read from the start of the answer to the end of line 8 on page 3.

A. The question is "What is transit traffic?"

The answer is: "Transit traffic is traffic Qwest neither originates nor terminates, but which is originated by other wireless and wireline carriers for delivery and termination to the end users of other carriers.

"Qwest provides transit service for wireline and wireless carriers who lack facilities or agreements sufficient to allow for the transport and termination of traffic directly to other carriers and their end users.

"When Qwest provides these services, Qwest is not acting in its capacity as an incumbent local exchange carrier and is not providing local exchange service, nor is it acting as an interexchange carrier, but rather provides transit functions that enable third-party carriers to interconnect and exchange traffic with one another."

Q. And given not only your experiences in the transit traffic case but generally, would you agree with the testimony of Mr. Staebell that you just read?

A. Generally I would. Transit-- Let me back up. Transport is generally a term used when we carry the traffic of an interexchange carrier.

So transport is an element of accessed tariffs.

Transit is a term that is used when we exchange local exchange traffic, for example, between CLECs within a local calling area or with wireless traffic because of the definition of their local calling area.

Q. Would you agree that one of the arguments that the rural LECs made in SPU-00-7, and I would represent in subsequent cases, is that because you

BOARD MEMBER MUNNS: --attaching.

Would those numbers be listed in a directory, do you know?

THE WITNESS: The subscriber of the local service for that is Qwest OneFlex.

But I assume that they give that number to their customers, their OneFlex customers, who would give them to their friend in Denver, if that's where the number is.

If you dial that local number in Denver, it would be routed to the VoIP POP where they bought local service at the VoIP connection where they have purchased local service in Denver.

BOARD MEMBER MUNNS: So the community of interest that you had a long discussion with counsel about is your own personal community of interest that you designate through these virtual numbers?

THE WITNESS: That's correct. You've chosen to make that your community of interest by going to Denver and getting a local number there.

BOARD MEMBER MUNNS: Okay. And I wanted to clarify one other thing. In the charts, and I hesitate to turn that thing on, but in the charts that counsel put up and the drawing, those were

C E R T I F I C A T E

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated.

That I took in shorthand all of the proceedings had at the said time and place, and that said portion of shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 2nd day of September, 2005.

Petersen Court Reporters

CERTIFIED SHORTHAND REPORTER

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE:

LEVEL 3 COMMUNICATIONS, LLC.,

Petitioner,

vs.

QWEST CORPORATION,

Respondent.

DOCKET NO. ARB-05-4

VOLUME I

Hearing Room
350 Maple Street
Des Moines, Iowa
Tuesday, August 30, 2005

Met, pursuant to notice, at 9:00 a.m.

BEFORE: THE IOWA UTILITIES BOARD

JOHN NORRIS, Chairman
DIANE C. MUNNS, Board Member
ELLIOTT G. SMITH, Board Member

COPY

EILEEN HICKS - CERTIFIED SHORTHAND REPORTER
EDIE SPRIGGS DANIELS - CERTIFIED SHORTHAND REPORTER

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C E R T I F I C A T E

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated.

That I took in shorthand all of the proceedings had at the said time and place, and that said portion of shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 31st day of August, 2005.

CERTIFIED SHORTHAND REPORTERS

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

| | |
|---|---|
| IN RE: | |
| LEVEL 3 COMMUNICATIONS, LLC., | |
| Petitioner, | DOCKET NO. ARB-05-4 |
| vs. | VOLUME III |
| QWEST CORPORATION, | |
| Respondent. | |

Hearing Room
350 Maple Street
Des Moines, Iowa
Friday, September 2, 2005

Met, pursuant to notice, at 9:00 a.m.

COPY

BEFORE: THE IOWA UTILITIES BOARD

JOHN NORRIS, Chairman
DIANE C. MUNNS, Board Member
ELLIOTT G. SMITH, Board Member

(Pages 894 through 1223.)

JACKIE M. SINNOTT - CERTIFIED SHORTHAND REPORTER
EDIE SPRIGGS DANIELS - CERTIFIED SHORTHAND REPORTER

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CERTIFICATE

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated.

That I took in shorthand all of the proceedings had at the said time and place, and that said portion of shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 6th day of September, 2005.

Edie Sprigge Danner

Jackie M Dinnott

CERTIFIED SHORTHAND REPORTERS

Attachment #2

BEFORE THE IOWA SUPREME COURT

NO. 04-0555

Polk County No. CV 4795

| | | |
|---|---|---|
| IOWA UTILITIES BOARD,<br><br>Respondent-Appellant,<br><br>v.<br><br>SPRINT COMMUNICATIONS COMPANY LP, LEVEL 3 COMMUNICATIONS, LLC, AND KMC TELECOM V, INC.<br><br>Petitioners-Appellees. | ) | SETTLEMENT |

Background:

On June 6, 2003, the Iowa Utilities Board (Board) issued a "Final Decision And Order" in consolidated Docket Nos. SPU-02-11/SPU-02-13, In re: Sprint Communications Company L.P. and Level 3 Communications, LLC. In that order, the Board reviewed a decision by the North American Numbering Plan Administrator (NANPA) to deny certain requests for telephone numbering resources in Iowa. The requests for number resources in question were filed by Sprint Communications Company L.P. (Sprint) and Level 3 Communications, LLC (Level 3).

Sprint and Level 3 sought telephone numbers for the purpose of providing a service identified as Managed Modem service, Dial IP service, and other names. In each case in this docket, the proposed service would involve telecommunications calls from an Iowa end-user customer physically located in one exchange to Internet service provider (ISP) equipment located outside that exchange. The only proposed services considered by this docket involved dial-up ISP-bound traffic, and the providers proposed to offer, the services using an arrangement known as Virtual NXX (VNXX). The Board did not consider any retail voice services.

The Board affirmed the NANPA denial of telephone numbers. The Board also considered whether the record made before the Board supported a permissible alternative means of providing the same or similar services, as permitted by 47 C.F.R. § 51.15(g)(4). The Board said:

> VNXX service, or some variation thereof, may be a useful and valuable service, if provided in a manner that does not unlawfully and unnecessarily deplete numbering resources and does not make use of facilities belonging to other carriers without paying appropriate compensation.

(Final Decision And Order at page 21.) The Board then gave "the parties nine months from the date of this order to try to negotiate an alternative means of providing the proposed service, one that uses numbers efficiently and also resolves intercarrier compensation issues." (Id., at page 25.) Thus, the Board's identified concerns with VNXX service were efficient use of telephone numbering resources and intercarrier compensation.

On July 7, 2003, Sprint, Level 3, and KMC Telecom V, Inc. (KMC), (collectively, the Petitioners) sought judicial review of the Board's "Final Decision And Order" in the Iowa District Court for Polk County. The matter was styled as "Sprint Communication Company LP, Level 3 Communications, LLC, and KMC Telecom V, Inc., v. Iowa Utilities Board," Polk County No. AA-4795.

On March 10, 2004, the Polk County District Court issued its "Ruling On Petition For Judicial Review," vacating the Board's order and remanding the matter to the Board for further proceedings consistent with the Court's ruling. (Ruling, page 13.) In its Ruling, the Court found:

> 1. The Board cannot require the Petitioners to obtain a certificate of public convenience and necessity in order to provide their proposed service in Iowa (Ruling at page 9);
>
> 2. The Board erred in its order "when it held that Petitioners' proposed service is not an authorized local service in Iowa" (Ruling at page 10);
>
> 3. "[T]he Board erred in its conclusion that Petitioners' proposed service available through VNXX architecture is unauthorized" (Ruling at page 11); and
>
> 4. "[T]he Board had no authority to compel the parties to negotiate an alternative means of providing dial-up service to ISPs." (Ruling at page 13.)

On April 6, 2004, the Board filed a notice of appeal to the Iowa Supreme Court, styled as "Sprint Communications Company, LP, Level 3 Communications, LLC, and KMC Telecom V, Inc., vs. Iowa Utilities Board," No. 04-0555.

The parties agree that from both a factual and legal perspective, there have been changes in the industry in the more than two years since the Board's order below. The parties believe these changes create a framework to resolve the pending appeal; the parties now mutually seek a non-litigious resolution through this settlement.

Stipulation and Agreement:

Based on the foregoing summary of the facts, the parties stipulate and agree as follows:

1. To date, the Board has defined VNXX-type services solely in terms of dial-up ISP-bound traffic. Since the time of the district court decision now on appeal, the Board has further addressed this issue in its Order in Lieu of Certificate in TF-05-31 (recognition of Level 3's wholesale VoIP products).

2. The Board's order in Docket Nos. SPU-02-11/SPU-02-13 expresses two concerns with VNXX traffic, which can be summarized as intercarrier compensation and telephone numbering efficiency.

3. To the extent a carrier chooses to offer VNXX services under the following circumstances, the Board's two identified concerns are substantially alleviated and may be eliminated:

   a. The VNXX services are offered pursuant to an approved interconnection agreement, either negotiated or arbitrated; and

   b. The incumbent local exchange carrier that is a party to the interconnection agreement has implemented thousand-block number pooling in all or most of its Iowa exchanges.

That a party using VNXX also provides voice services, which was not in the record of the underlying Board dockets, would also tend to alleviate concerns about numbering efficiency.

4. Given this understanding of the parties to the Iowa Supreme Court action, the parties are further agreed that:

   a. To the extent the pending appeal to the Iowa Supreme Court involves the merits of the Board's "Final Decision And Order," the foregoing stipulations make it unnecessary to obtain a final decision from the Court; based on the facts in the Board's possession, Sprint and Level 3 presently operate or propose to operate in a manner which alleviates the Board's concerns regarding number resources, to-wit, in exchanges where number pooling is available, Sprint and Level 3 may obtain number resources and utilize VNXX architecture consistent with this Stipulation pursuant to or upon future approval of an appropriate interconnection agreement in which the compensation issues are addressed.

b. Because the Polk County District Court's ruling ordered a remand and addressed the Board's use of managed negotiations, and both procedures will be moot under this stipulation and agreement, the parties agree and stipulate to request a limited remand from the Iowa Supreme Court to the Polk County District Court for entry of a stipulated order vacating the District Court's Ruling, after which the Board will dismiss its appeal.

Entered into this 2ND day of December, 2005.


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